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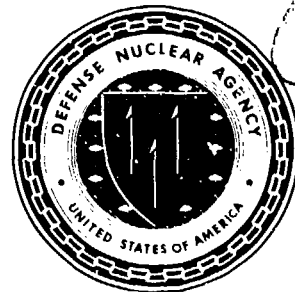
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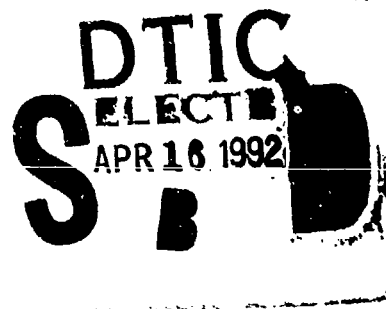
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## **Harmonizing the Chemical Weapons Convention with the United States Constitution**

**Jerry R. Stockton  
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**April 1992**

**Technical Report**



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inspections potentially infringes on the Fourth Amendment's requirement that the government respect the privacy rights of Americans. That elements of these inspections may threaten individual with self-incrimination, unfair legal process and uncompensated taking of property potentially violates the Fifth Amendment.

The recommendations for legislation and modifications to the text of the Convention must be treated as an integrated package. While alternative options are available for some of the problems, the ultimate success of any effort to harmonize the CWC with the United States Constitution requires a comprehensive and deliberate effort to craft a precise fit between their imperatives.

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## EXECUTIVE SUMMARY

The on-site inspection provisions of the Draft Chemical Weapons Convention (CWC) pose unprecedented constitutional difficulties in the United States. Federal implementing legislation can advance most of the Draft Convention's obligations to permit inspections in accord with the Bill of Rights. In some instances, changes in the text of the Draft Convention may be necessary to ensure constitutionality.

The Draft Convention introduces international law enforcement to the tasks of verifying the destruction of existing chemical weapons and the prevention of new weapons production. The Draft Convention establishes an elaborate system for regulating all production and acquisition of weapons-capable chemicals by State Parties. The success of these restrictions will be verified through two types of on-site inspections: (1) routine inspections of declared facilities and (2) challenge inspections at any facility or location without delay. Both types of inspections contemplate that the State Party exercising sovereignty over the inspected site will actively cooperate with the International Organization.

These inspections could threaten rights guaranteed by the Fourth and Fifth Amendments to the United States Constitution. The Fourth Amendment commands the government to respect the privacy rights of Americans, usually requiring search warrants issued by neutral magistrates prior to government inspections. The Fifth Amendment includes among its protections the right against self-incrimination and the right to be compensated when the government takes private property.

Since no provision of a treaty may contravene the Constitution, a lawsuit contesting an inspection on constitutional grounds could compel a court to disapprove the treaty. Carefully crafted implementing legislation striking a reasonable balance between CWC verification activities and the Constitution will enable most inspections to proceed with strong legal support. Certain changes to the CWC itself will further strengthen this foundation.

No Fourth Amendment problem is presented by inspections of government facilities because the federal government itself is not protected by the Constitution. Similarly, private facilities that hold government contracts or licenses probably can be compelled, as a condition of the bargain, to waive their constitutional rights so long as the waiver is rationally related to the government's interest. Thus, waivers should be required from government contractors and licensees whose activities involve national security.

Private facilities having Schedule 1 or 2 chemicals may be subject to warrantless routine inspections without contravening their Fourth Amendment rights. First, the CWC implementing legislation can establish a pervasive regulatory scheme specifying the government interest in CWC compliance and justifying the absence of warrants for routine inspections. Second, the implementing legislation can advise these facility owners that inspections will proceed in accordance with the terms of the CWC. However, the Draft Convention's failure to stipulate the frequency of routine inspections does not satisfy the constitutional requirement that there be notice of certain and regular inspections. The Draft Convention should, therefore, be modified by defining the frequency and scope of these inspections.

Even if warrantless routine inspections may proceed under the pervasive regulation exception, the absence of any limitations on the inspection of commercial documents or personal property suggests constitutionally impermissible authority to intrude on privacy. The Draft Convention should, therefore, be modified to permit inspectors to search only commercial property that is directly relevant to verifying the declarations required of the inspected facility.



Challenge inspections are especially troublesome because they do not require warrants and are based on suspicion -- when Fourth Amendment protections are heightened. Requiring search warrants is inappropriate for challenge inspections of declared facilities in the United States because refusal by a judge to issue a warrant for such a search could cause the United States to breach the CWC. This Fourth Amendment problem can be approached by specifying in implementing legislation that the pervasive regulatory scheme suggested to validate routine inspections also be extended to encompass challenge inspections of declared facilities, with the addition of Schedule 3 facilities. Alternatively, the Draft Convention could be modified to allow refusal of challenge inspections which contravene a challenged State Party's "legal obligations."

Since challenge inspections of undeclared facilities may be refused under the present United States position on this issue if inconsistent with the legal obligations of the United States, the implementing legislation may include a scheme requiring judges to issue search warrants based on a showing of administrative probable cause. Even if a warrant request is denied, the CWC would not be breached.

Challenge inspections also raise problems because actions taken to secure the site perimeter may entail detaining persons, searching means of transport, and aiming highly intrusive monitoring equipment into the site. The Draft Convention should be modified to provide that detentions be made as brief as possible. Private passenger vehicles should be exempted from searches. Intrusive inspections of commercial means of transport should be permissible only to the extent these carriers are owned or leased by pervasively regulated facilities. In addition, the implementing legislation should specify that commercial means of transport carrying scheduled chemicals are subject to inspection as part of the safety inspection scheme to which they are already subject. The use of perimeter monitoring equipment may be constitutional if limited to devices that are highly selective for information relevant to enforcing the Draft Convention, without revealing private information.

The National Authority must be empowered to obtain the evidence required by the CWC. The implementing legislation should provide for administrative subpoenas to facilitate investigations. The possibility of uncovering evidence of illegal activity raises concerns for the Fifth Amendment's prohibition against self-incrimination. Therefore, the CWC implementing legislation should also provide for "use immunity" from prosecution for those who are forced to testify, and evidence gathered from CWC inspections should be excluded from subsequent prosecutions.

The possibility that inspections will involve human biomedical sampling raises unique Fourth Amendment problems. The Draft Convention should clarify its intentions in this regard either by prohibiting such testing or by compelling sampling only of persons who are in physical proximity to biochemical indicators, protected by procedures that minimize the intrusion of the person's privacy.

The Draft Convention's call for the enactment of penal legislation complicates the legality of inspections because warrantless searches may lead to criminal prosecutions implicating the Fifth Amendment right against self-incrimination. The simplest option would be to delete this requirement from the Draft Convention. Alternatively, the required domestic penal legislation could be explicitly limited to violations of the provisions of Article I, rather than penalizing noncompliance with inspection scheme requirements. At a minimum, the individual agreements at each Schedule 1 or 2 facility should provide that no evidence gained during CWC inspections will be used in subsequent criminal proceedings.

American citizens must have a legal remedy if CWC inspections violate their rights, but injunctions against CWC inspections should be banned lest a court interfere with the CWC compliance obligations of the United States. Instead, the subject of an inspection should be permitted to seek monetary damages to compensate for losses that actually result. The implementing legislation should

explicitly waive the federal government's sovereign immunity from such claims because the domestic costs of CWC compliance should fall on the United States.

In order to protect against the potential loss of trade secrets, a comprehensive system for safeguarding trade secrets should be developed that includes provisions for specifying data that the owner seeks to shield from potential revelation to competitors. Because release of a trade secret pursuant to a CWC inspection could raise a claim that the loss is a Fifth Amendment taking of private property, existing domestic regulatory statutes could be amended to put regulated firms on notice that their trade secrets might be disclosed to the International Organization as a result of United States' compliance with the CWC. Furthermore, the implementing legislation could establish an administrative process for the payment of such claims if any arise.

These recommendations for legislation and modifications to the text of the Convention must be treated as an integrated package. While alternative options are available for some of the problems, the ultimate success of any effort to harmonize the CWC with the United States Constitution requires a comprehensive and deliberate effort to craft a precise fit between their imperatives.

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## **PREFACE**

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## SECTION 1

### INTRODUCTION

The Draft Chemical Weapons Convention (Convention or CWC)<sup>1</sup> will authorize an unprecedented level of foreign law enforcement activity in the United States that raises constitutional issues never before encountered under arms control agreements. The federal government will be obligated to facilitate CWC on-site verification inspections and, at the same time, protect the constitutional rights of Americans. This analysis focuses on the constitutional implications of the CWC inspection provisions and presents approaches to fulfill these obligations.

Harmonizing the CWC and the Constitution will require a specific Act of Congress at the time of ratification, as well as certain changes to the Convention itself prior to Presidential signature. The federal legislation will be necessary to implement two related purposes. First, it must create the mechanisms to carry out required inspections in the United States to the greatest extent constitutionally permissible. Second, this legislation must protect constitutional liberties that the Convention might otherwise compromise. This report considers, as examples, federal legislation which addresses analogous problems.

Federal legislation is the most appropriate method of integrating CWC inspections into domestic law. The authors believe that alterations to the treaty language should be reserved only for constitutional problems that cannot be resolved legislatively. Accordingly, this analysis presents only those CWC revisions that are necessary to limit the inspection powers of the International Organization to what would be constitutional in the United States, assuming that the implementing legislation will extend the scope of allowable inspections as much as possible.

Generally, this material is presented in a format intended to highlight potential problems and identify feasible solutions. Although the appendices to this report briefly outline issues of costs and verifiability, questions concerning the number and type of facilities that may be subject to the CWC's inspection provisions are left to further detailed study.<sup>2</sup> Most important, this report makes no policy judgments regarding the value or feasibility of the CWC as a whole.

This report is divided into eight additional sections. Section 2 presents a brief overview of the Draft Convention. Section 3 introduces the relevant Fourth and Fifth Amendment concerns and analyzes

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1. This study is based on the August 27, 1991 version of the Draft Convention, also referred to as the "rolling text," United Nations Conference on Disarmament: *Report of the Ad Hoc Committee on Chemical Weapons to the Conference on Disarmament*, U.N. Doc. CD/1108 (27 August 1991) [hereinafter *CWC* or *Draft Convention*]. A key part of the rolling text for this analysis is the Addendum to App. I, Protocol on Inspection Procedures [hereinafter *Protocol on Inspection Procedures*] which specifies the details of the CWC on-site inspection scheme. In addition, this study assumes that the "rolling text" is modified by the two documents reflecting the current United States position on challenge inspections: U.N. Doc. CD/CW/WP.352 (15 July 1991) which includes the *Recommended Text for Article IX -- Challenge Inspection* [hereinafter *July 15 WP -- Article IX*] and the Protocol on Inspection Procedures [hereinafter *July 15 WP -- Protocol*]; and by U.N. Doc. CD/CW/WP.356 (6 August 1991) *Challenge Inspection Procedures for Declared Facilities* [hereinafter *August 6 WP*].

2. More research is needed on questions relating to the facilities that would be affected by the CWC, as well as on the verification methods to which they might be subject. See generally J. AROESTY, K.A. WOLF & E.C. RIVER, DOMESTIC IMPLEMENTATION OF A CHEMICAL WEAPONS TREATY, app. B-C (RAND Corp. paper prepared for Under Secretary of Defense for Acquisition, No. R-3745-ACQ, 1989); Hutchinson, Lentz & English, *Chemical Weapons Treaty Verification*, ARMY RESEARCH & DEV. BULL., Nov.-Dec. 1991, at 22.

the constitutional process and effect of domestic treaty ratification. Section 4 examines the extent of constitutional protections afforded to government facilities and its contractors. Sections 5 and 6 describe problematic aspects of routine and challenge inspections, constitutional implications, and implementation measures that can substantially broaden the scope of permissible inspections in order to promote CWC compliance in the United States. Section 7 investigates problems of enforcement inherent in both routine and challenge inspections concerning the procurement and use of evidence and suggests specific legal solutions. Section 8 discusses the remedies that should be made available to Americans who are harmed by CWC inspections. Section 9 presents the conclusions of this study.

In addition, several appendices are included as aids to further understanding. Appendix A contains two tables summarizing the recommended implementing legislation and changes to the Draft Convention. Appendix B is a brief discussion of the effects on CWC verifiability of the suggestions contained in this analysis. Appendix C describes some of the pecuniary impacts that might result from their implementation. Finally, as a research companion, the reader is referred to Appendix D for a detailed description of BDM's electronic reference system, known as "CWC Law." Designed for use with IBM-compatible personal computers, CWC Law is available on four 5¼-inch floppy diskettes. CWC Law provides access to the pertinent text of the citations referenced in each footnote.



## SECTION 2

### OVERVIEW OF THE DRAFT CONVENTION

The Geneva Protocol of 1925<sup>3</sup> banned wartime use of poison gas and biological weapons but did not regulate their manufacture and storage so long as they are not actually used. Recognizing the inadequacy of this prohibition in light of the recent proliferation of chemical weapons, the United Nations has authorized the Conference on Disarmament to negotiate a multilateral convention that would completely and effectively prohibit the development, production and stockpiling of these weapons.<sup>4</sup> In accordance with that directive, the *Ad Hoc* Committee on Chemical Weapons was established to conduct the CWC negotiations and to prepare a report to the full Conference.

The CWC creates a new international regime -- the Organization for the Prohibition of Chemical Weapons (the Organization) -- which will govern the production capabilities of State Parties and engender mutual assurance that the objectives of the CWC are, in fact, being met.<sup>5</sup> The Organization will be a powerful international regime, vested with extensive legislative, investigative and judicial responsibilities. Taken as a whole, it signifies a systematic introduction of international law enforcement into chemical weapons control.

To carry out this responsibility, the Organization will comprise three bodies. The Conference of the State Parties will have jurisdiction to enact rules of procedure, evaluate compliance and resolve issues regarding the scope of the CWC. The Executive Council will oversee activities on a day-to-day basis, including supervising verification. The Technical Secretariat will have primary responsibility for monitoring and inspecting facilities that could become involved in illegal chemical weapons production.

The CWC has two purposes. First, it mandates declaration and destruction of existing chemical weapon stockpiles and production facilities;<sup>6</sup> destruction must begin within one year and be completed not later than ten years after the CWC takes effect.<sup>7</sup> Each State Party may destroy its weapons and facilities by any means it chooses, so long as the destruction can be verified.<sup>8</sup>

Second, the CWC seeks to deprive states of the industrial capability to resume chemical weapons production and storage. Verifying nonproduction of chemical weapons is the core of the CWC. Even

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3. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, done June 17, 1925, 26 U.S.T. 571, T.I.A.S. No. 8061, 94 L.N.T.S. 65 (entered into force for the United States April 10, 1975), reprinted in U.S. ARMS CONTROL & DISARM. AGENCY, ARMS CONTROL AND DISARMAMENT AGREEMENTS: TEXTS AND HISTORIES OF THE NEGOTIATIONS 15 (6th ed. 1990).

4. General Assembly resolutions 43/74 A and C. U.N. Conference on Disarmament, Report of the Ad Hoc Committee on Chemical Weapons to the Conference on Disarmament, U.N. Doc. CD/952, at 1 (Aug. 18, 1989).

5. Draft Convention, *supra* note 1, app. I, art. VIII.

6. *Id.* art. I, §§ 5-6.

7. *Id.* art. IV, § 6(a) (chemical weapons); art. V, § 8(a) (production facilities).

8. *Id.* Annex to Article IV, ¶ III(A)(3) (chemical weapons); Annex to Article V, ¶ III(A) (facilities). Certain environmentally unsound processes are prohibited.

State Parties with no chemical weapons to be destroyed must comply with the verification measures. While each State Party has the right to produce and use toxic chemicals for legitimate commercial purposes, such production and use carries the concomitant obligation to ensure that these chemicals are not used for purposes prohibited by the CWC.<sup>9</sup> Verification of activities not prohibited by the CWC entails an elaborate mechanism for monitoring all production and acquisition of various chemicals by signatory nations.

While verification of compliance with a chemical weapons treaty is abstractly similar to verifying nuclear nonproliferation, the greater size of the chemical and pharmaceutical industries, and the larger diversity of chemical weapons precursors, complicate the effort to prohibit clandestine weapons production. The existence of dynamic and diversified global industries, whose production may be easily converted to lethal agents, means that CWC verification must be both more extensive and intrusive than for nuclear weapons.

In order to facilitate verification, the CWC categorizes chemicals into three Schedules based upon their suitability for use in weaponry and their legitimate commercial value.<sup>10</sup> Schedule 1<sup>11</sup> contains a list of thirteen "super-toxic lethal chemicals" that (1) are actual warfare agents; (2) pose a particular risk of potential use as chemical weapons; (3) are key precursors with chemical structures closely related to chemical weapons; or (4) pose a high risk of conversion into chemical weapons. Schedule 2<sup>12</sup> lists chemicals that have some legitimate commercial uses, but which are also key precursor chemicals to warfare agents or to the production of Schedule 1 chemicals, or are super-toxic lethal chemicals not listed in Schedule 1 but which pose a significant risk to the objectives of the Convention. Schedule 3<sup>13</sup> lists chemicals that are several steps removed from warfare agents, but are either dual purpose chemicals with properties similar to chemicals used in weapons, or important precursors to Schedule 1 or Schedule 2 chemicals.

The Technical Secretariat is authorized to observe the production of these chemicals by each State Party.<sup>14</sup> Continuous monitoring systems using "approved equipment"<sup>15</sup> that correspond "strictly and efficiently to the sole purpose of detecting prohibited or unauthorized activities" may be installed, with

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9. *Id.* art. VI, § 1.

10. *See id.* Annex on Chemicals, ¶ III(A).

11. *Id.* ¶ II(A). Two distinct types of facilities may possess Schedule 1 chemicals: a "single small-scale facility" and facilities "outside a single small-scale facility" which may possess limited quantities of Schedule 1 chemicals for specified purposes (i.e.; protective, research, medical or pharmaceutical purposes). *Id.* Annex 1 to art. VI Production, ¶ 1-3.

12. *Id.* Annex on Chemicals, ¶ II(B)-(C).

13. *Id.* ¶ II(D).

14. Protocol on Inspection Procedures, *supra* note 1, pt. II, ¶ III(A)(1), (4). Monitoring systems include, *inter alia*, sensors, ancillary equipment, and transmissions systems, and may incorporate tamper-indicating and tamper-resistant devices as well as data-protection and data-authentication features. The instruments used will be specified in the Model Agreement.

15. *Id.* pt. I, ¶ IV(D). Continuous monitoring equipment must be installed in all Schedule 1 facilities. Draft Convention, *supra*, note 1, app. 1, Annex 1 to art. VI, ¶ II(2).

the coverage of the system accordingly limited.<sup>16</sup> Each State Party has the right to inspect and test any equipment installed in its territory by the Technical Secretariat,<sup>17</sup> must provide the necessary preparation and support for continuous monitoring instruments,<sup>18</sup> and must report to the Technical Secretariat any event that may impact the monitoring system.<sup>19</sup>

State Parties must make initial and annual declarations of the total amount of each scheduled chemical produced, consumed, imported, or exported and the purposes for which these chemicals are obtained or processed, as well as extensive information about production facilities. The disclosure requirements vary according to the applicable schedule for the chemicals at the facility.<sup>20</sup>

The principal methods of verification are "routine inspections" and "challenge inspections." Routine inspections permit the Technical Secretariat to verify that annual declarations for each Schedule 1 or 2 facility are accurate. The two goals of routine inspections are to deter violations without hampering the economic or technological development of State Parties, and to compile sufficient accurate information to permit a high degree of accord among the parties as to what specific conduct constitutes a violation. Facilities holding Schedule 3 chemicals, while obligated to make annual declarations of their activities, will not be subject to routine on-site inspections.<sup>21</sup>

Challenge inspections serve a complementary function. If a State Party suspects noncompliance by another, that State Party may request an inspection of any "location or facility."<sup>22</sup> Challenge inspections are relatively unconstrained, with the goal of clarifying "doubts about compliance."<sup>23</sup>

The Director General must ensure the protection of confidential information acquired through verification activities. No information obtained by the Organization will be published or released, except: (1) general information on the implementation of the CWC released according to the decision of the Conference of the State Parties or the Executive Council; (2) information released with the express

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16. *Id.* pt. II, ¶ III(A)(6).

17. *Id.* ¶ III(A)(2).

18. This shall include: (1) utilities necessary for the construction and operation of the monitoring system (i.e., electrical power and heating); (2) basic construction materials; (3) necessary site preparation to accommodate installation; and (4) transportation for necessary tools, materials, and equipment from the point of entry to the construction site. *Id.* ¶ III(A)(5)(i)-(iv).

19. *Id.* ¶ III(A)(9)-(10).

20. State Parties must declare annually the locations, inventories, and past and future activities of Schedule 1 facilities. *Draft Convention, supra* note 1, app. I, Annex 1 to art. VI. State Parties must also annually declare various national data regarding their Schedule 2 chemicals, as well as the location of each Schedule 2 facility, the types, quantities and destinations of its Schedule 2 chemicals, and the owners, capacities, purposes and plans of its Schedule 2 facilities. *Id.* Annex 2 to art. VI. Declaration requirements for Schedule 3 facilities are similar but do not include information as to the destination and purposes of such production. *Id.* Annex 3 to art. VI.

21. *Id.* Annex 3 to art. VI.

22. *July 15 WP - Art. IX, supra* note 1, art. IX.

23. *Id.*

consent of the inspected State Party; or (3) confidential information released pursuant to agreed procedures in strict conformity with the needs of the Convention.<sup>24</sup>

Both types of inspections share the common goal of verifying the nonproduction of chemical weapons without interfering with the legal rights of State Parties or their citizens. The CWC's guiding principle is that on-site inspections be implemented in a manner that avoids undue intrusion into chemical activities engaged in for peaceful purposes.<sup>25</sup>

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24. *Draft Convention*, *supra* note 1, app. I, Annex on the Protection of Confidential Information, ¶ A(2)(a)(i)-(ii). The level of sensitivity of the confidential information or data will be established based on uniform criteria to be developed by the Technical Secretariat. *Id.* ¶ A(2)(d).

25. *Id.* art. VI, § 9.

## SECTION 3

### OVERVIEW OF CONSTITUTIONAL ISSUES

#### 3.1 RELEVANT CONSTITUTIONAL PROTECTIONS.

CWC verification will require that international inspectors obtain information from Americans. This process could threaten rights guaranteed by the Fourth and Fifth Amendments to the United States Constitution because these stand out as the most important safeguards against the encroachments which verification inspectors might cause. It is necessary, therefore, to understand these protections in order to assure compliance under the Constitution with the CWC following its ratification as the law of the land.

##### 3.1.1 Fourth Amendment Protections Against Unreasonable Inspections.

The special concern of the Fourth Amendment<sup>26</sup> is that government authority respect a person's "reasonable expectations of privacy."<sup>27</sup> The Supreme Court has adopted the general rule that a search warrant<sup>28</sup> is a necessary prerequisite to a constitutionally valid inspection.<sup>29</sup> The justification for this rule is that a magistrate interposes a neutral review process between the government agency seeking the inspection and its subject.<sup>30</sup> Central to this review process is the requirement that the government prove to the magistrate that it has "probable cause" to believe that the proposed search will discover evidence of a violation.<sup>31</sup>

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26. The Fourth Amendment reads:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

27. *Katz v. United States*, 389 U.S. 347, 360-62 (1967) (Harlan, J., concurring).

28. A search warrant is defined as:

[a]n order in writing, issued by a justice or other magistrate, in the name of the state, directed to a sheriff, constable, or other officer, authorizing him to search for and seize any property that constitutes evidence of the commission of a crime, contraband, the fruits of crime, or things otherwise criminally possessed; or, property designed or intended for use or which is or has been used as the means of committing a crime.

BLACK'S LAW DICTIONARY 1350 (6th ed. 1991).

29. *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967).

30. *United States v. Chadwick*, 433 U.S. 1, 9 (1977).

31. "Probable cause," although defying simple definition, has been characterized as "a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213 (1983).

While warrants are generally required for searches, not all government inspections are "searches." For example, a person has no reasonable expectation of privacy in objects that are in "plain view," because "[w]hat is observable by the public is observable, without a warrant, by the Government inspector as well."<sup>32</sup> Accordingly, inspectors are not conducting "searches" when they sense (see, hear or smell) what is detectable by anyone nearby.<sup>33</sup> The same logic applies to mere entry into the public portions of commercial establishments,<sup>34</sup> as well as to aerial overflights of open industrial facilities (at least where any sensing equipment is relatively unsophisticated).<sup>35</sup> Furthermore, government searches need no warrant when the person consents to being searched.<sup>36</sup>

### 3.1.2 Fifth Amendment Protections.

The Fifth Amendment<sup>37</sup> protects against several abuses. Those with potential relevance to the CWC include the right against self-incrimination and the right to be compensated for private property taken by the government.<sup>38</sup>

**3.1.2.1 Right Against Self-Incrimination.** The Fifth Amendment right against self-incrimination is intended to prevent a witness from being forced to give testimony that can be used in a criminal prosecution against him or her.<sup>39</sup>

So long as an individual's answers to official questions might be employed by the questioning jurisdiction as evidence, or as leads to evidence in a future criminal prosecution of that individual, the fifth amendment . . . confers a privilege to be silent. Exercise of

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32. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 315 (1977).

33. *Air Pollution Variance Bd. v. Western Alfalfa*, 416 U.S. 861 (1973).

34. *Barlow's, Inc.*, 436 U.S. at 315.

35. *See Dow Chemical Co. v. United States*, 476 U.S. 227, 238 (1986).

36. In *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973), the Supreme Court examined the theoretical basis of the consent search concept and endorsed a process of "examining all the surrounding circumstances to determine if in fact the consent to search was coerced." *Id.* at 229.

37. The Fifth Amendment reads in pertinent part:

No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend V.

38. *See generally* B. CARNAHAN, CONSTITUTIONAL IMPLICATIONS OF IMPLEMENTING A CHEMICAL WEAPONS CONVENTION 26-33 (paper prepared by Science Applications International, Inc. for U.S. Dept. of Energy Office of Arms Control under Contract No. DE-AC01-88DP50066 1990).

39. Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 684-85 (7th ed. 1990).

such a privilege can neither be equated with guilt nor be treated as a forbidden failure to cooperate with a proper inquiry. . . .<sup>40</sup>

However, if criminal prosecution is not possible, for example where the government has granted immunity from prosecution, the witness can be coerced by the threat of punishment to provide incriminating evidence or to confess to the crime itself.<sup>41</sup>

**3.1.2.2 Right to Compensation for Property Taken by the Government.** The Fifth Amendment guarantees that one whose property is taken by the government is entitled to be compensated for the fair market value of the loss.<sup>42</sup> The definition of what constitutes "property" is generally a matter of applicable state law, and can include tangible items or intangible property such as trade secrets.<sup>43</sup> A "taking" of property may include not only direct government seizure, but destruction of its value so that the owner no longer can enjoy its use.<sup>44</sup> Traditionally, compensation for property that the federal government has taken is obtained by suing the federal government in the U.S. Court of Claims under the terms of the Tucker Act.<sup>45</sup>

### 3.2 CWC RATIFICATION AND ITS EFFECTS.

The CWC implementation process will begin with Presidential signature and submission to the U.S. Senate. Upon Senate consent by a two-thirds margin<sup>46</sup> and Presidential ratification, the CWC will become the supreme law of the land,<sup>47</sup> as well as binding under international law.<sup>48</sup> In addition to

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40. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-26, at 1021 (2d ed. 1988) (footnotes omitted).

41. *Id.* at 1022 (footnotes omitted).

42. *Id.* § 9-2, at 590.

43. *Id.* § 9-3, at 592. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984), defined a trade secret as "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it," quoting RESTATEMENT OF TORTS § 757, comment b (1939).

44. *Id.* at 592-93. "Once the data that constitute a trade secret are disclosed to others, or others are allowed to use those data, the holder of the trade secret has lost his property interest in that data." *Monsanto*, 467 U.S. at 1011 (footnote omitted).

45. 28 U.S.C. § 1491.

46. The President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators concur." U.S. CONST. art. II, § 2, cl. 2.

47. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land. . . .

U.S. CONST. art. VI, § 2.

48. See generally L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION (1972).

Senate approval, Congress will need to enact separate implementing legislation<sup>49</sup> because the CWC will create an affirmative obligation for the United States to enact a statute providing for the verification inspections it contemplates.<sup>50</sup>

Since the CWC inspection provisions authorize an unprecedented level of foreign law enforcement activity in the United States, any implementing legislation must protect against potential unconstitutional encroachments.<sup>51</sup> No provision of a treaty may contravene any of the prohibitions or limitations of the Constitution<sup>52</sup> because "[t]he President and the Senate cannot do by treaty what the whole government is interdicted from doing in any way."<sup>53</sup> The federal government is one of enumerated powers only: "Congress and the President, like the courts, possess no power not derived from the Constitution."<sup>54</sup> Consequently, the Constitution does not provide that a "branch of the government, composed of the president and some foreign nation, with a veto vested in the Senate, is authorized to enact local police regulations governing the affairs of our citizens."<sup>55</sup>

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49. *Panel Discussion, AM. ASS'N ADVANCEMENT SCIENCE, IMPLEMENTING A GLOBAL CHEMICAL WEAPONS CONVENTION* 25, 26 (1989) (statement of Robert Mikulak, U.S. Arms Control & Disarm. Agency).

50. The explicit terms of the Convention require that "[e]ach State Party shall, in accordance with its constitutional processes, adopt the necessary measures to implement its obligations under this Convention. . . ." *Draft Convention, supra* note 1, app. I, art. VII, § 1. Furthermore, the CWC will directly impact American citizens by limiting production of specified chemicals and subjecting many private facilities to extensive reporting requirements and inspections.

51. The CWC's inspection scheme mandates warrantless routine and challenge on-site inspections of private facilities. As soon as the Technical Secretariat requests the first warrantless routine inspection of a private facility, a citizen's right to privacy will necessarily be affected.

52. *Reid v. Covert*, 354 U.S. 1, 15-19 (1957). See 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 302 (1987):

§ 302 Scope of International Agreements: Law of the United States

(1) The United States has authority under the Constitution to make international agreements.

(2) No provision of an agreement may contravene any of the prohibitions or limitations of the Constitution applicable to the exercise of authority by the United States.

Even Alexander Hamilton, a staunch Federalist, wrote that "A treaty cannot be made which alters the Constitution of the country or which infringes any express exceptions to the power of the Constitution of the United States." F. HOLMAN, *STORY OF THE BRICKER AMENDMENT* 28 (1954) quoting 4 A. HAMILTON, *HAMILTON'S WORKS* 342.

53. T. JEFFERSON, *PARLIAMENTARY PRACTICE* (1801), cited in F. HOLMAN, *supra* note 52, at 55. See also L. HENKIN, *ARMS CONTROL AND THE CONSTITUTION* 30 (1958): "Every provision in a treaty promising another nation that the United States will take or not take certain action is by its nature an agreement which 'bargains away' the earlier right of the United States -- through the Congress or the President or both -- to do or not to do the contrary."

54. *Ex parte Quirin*, 317 U.S. 1, 25 (1942), cited in L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 291 (1972).

55. Thompson, *State Sovereignty and the Treaty-Making Power*, 11 CALIF. L. REV. 242 (1922), cited in F. HOLMAN, *supra* note 52, at 28-29.



The fundamental question here is whether the inspection activities of the international organization manifest "state action" of the United States government thereby triggering constitutional protections. Only if inspections are "state action" must the implementing legislation establish mechanisms assuring that they proceed in accord with the Constitution.

"State action," for constitutional purposes, is defined as activity involving a sufficiently close nexus between the federal government and the challenged action so that it may fairly be treated as an endeavor of the United States.<sup>56</sup> Most constitutional rights protect against infringement only by the government or its agents — if there is no state action, then, by definition, there has been no transgression of a constitutional right of the people. While the Constitution does not protect against activities of foreign governments, the federal government is accountable when it so encourages the coercive power of another actor that the encroachment is deemed to be the responsibility of the government itself.<sup>57</sup>

Applying this definition, domestic CWC inspections will be actions of the United States for two reasons. First, the CWC will be a non-self-executing treaty<sup>58</sup> because its requirements cannot be fulfilled without legislation.<sup>59</sup> The congressional implementing legislation that is required by Article VII of the CWC would constitute federal authority for the inspection: "[I]f foreign or international officials inspect in the United States pursuant to such authorization, these activities are presumably subject to the same constitutional limitations as if they were executed by federal officials. The United States cannot confer on foreign officials authority to do what the United States could not do through its own officers."<sup>60</sup>

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56. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974).

57. *Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1981), *quoting* *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1981). For a full discussion of this principle in the context of a foreign search, see *Stevens v. Morrison-Knudsen Saudi Arabia Consortium*, 576 F. Supp. 516 (D. Md. 1983) (American employers under contract with the United States Army Corps of Engineers to construct military facilities for the Saudi Government were not liable for alleged violations of three construction workers' constitutional rights arising from a search that led to their conviction, by Saudi authorities, for possession of marijuana. The court found no state action because the mere construction of a military facility for a foreign country under general supervision of the Corps is hardly the performance of a function traditionally reserved as the exclusive prerogative of the United States, and acts of a private contractor do not become acts of the government by reason of their engagement in performing public contracts.).

58. A treaty requiring an act of Congress to carry out the international obligation is non-self-executing. L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION*, 157-58 (1972). "The test for determining if a treaty requires implementing legislation is whether the terms of the treaty import an obligation that must be executed by the legislature before it can become enforceable by the courts." II M.C. BASSIOUNI, *INTERNATIONAL EXTRADITION* 74 (1987). "Where a treaty is incomplete either because it expressly calls for implementing legislation or because it calls for the performance of a particular affirmative act by the contracting sovereigns, which act or acts can only be performed through a legislative act, such a treaty is for obvious reasons not self-executing and subsequent legislation must be enacted before such treaty is enforceable by the courts." *Aerovias Interamericanas de Panama v. Board of Commissioners of Dade County*, 197 F. Supp. 230 (S.D.Fla. 1961), *rev'd on other grounds sub nom. Board of County Commissioners of Dade County v. Aerolineas Peruanas*, 307 F.2d 802 (5th Cir. 1962), *cert. denied*, 371 U.S. 961 (1962).

59. The opinion that the CWC will be non-self-executing is widely shared. See B. CARNAHAN, *supra* note 38, at 2.

60. L. HENKIN, *ARMS CONTROL INSPECTION IN AMERICAN LAW* 55 (1958).

Second, CWC inspections will be state action because of the universally recognized principle of international law which holds that every state, as "a concomitant of sovereignty," exercises jurisdiction over all persons, legal entities and objects within its physical boundaries.<sup>61</sup> According to Chief Justice Marshall:

The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of its restriction, and an investment of the sovereignty, to the same extent, in that power, which could impose such restriction.<sup>62</sup>

It cannot be seriously disputed that the CWC inspection scheme encompasses activity that has traditionally been a governmental function.<sup>63</sup> The United States government's participation in the inspection of facilities in the territory of the United States is clearly sufficient to have constitutional significance. Even a cursory review of the Draft Convention reveals the magnitude and significance of the host State Party's involvement in the inspection scheme. The United States will be involved from the moment it issues the first inspector visa until it finishes reviewing the last inspection report.<sup>64</sup> Not one decision in American law even suggests that the Constitution would be inapplicable to searches by foreign officials of Americans within the territory of the United States.

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61. M.C. BASSIOUNI, *supra* note 58, at 254.

62. *Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116 (1812).

63. The United States could agree to abolish existing armies and armaments, and to refrain from the raising of armies, and from the manufacture, possession or research and development of armaments in the future. It could agree to create a complex international organization to provide comprehensive inspection that would abolish the secrecy of governmental operations, require full reporting, and subject government installations, activities and files to unlimited surveillance, and its officials to international interrogation. . . .

That proposal might have given to an international authority power to regulate the activities not only of the Government of the United States but of manufacturers, scientists, laborers, and citizens generally. A body with such powers and functions would be exercising governmental authority within the United States, assuming functions of the President and Congress.

L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 195-96 (1972) (emphasis added).

64. See sections 2.1 and 2.2, *supra*. In addition to the many specified functions that the host State Party must perform, it is also relevant to consider what would happen in the event that a private citizen refuses to comply with an inspection (with or without constitutional justification). Under the CWC, the United States government would be obligated to instigate some act of compulsion against that individual in order to attain CWC compliance. It is difficult to imagine stronger evidence of state action.

It is the authors' position, therefore, that the Fourth and Fifth Amendments apply to CWC inspections,<sup>65</sup> raising the possibility of lawsuits seeking to halt CWC inspections.<sup>66</sup> The prospect of judicial review and enforcement of such a challenge raises profound ambiguities.<sup>67</sup> Prudence dictates that a federal initiative as significant as negotiation and ratification of the CWC should proceed in accord with the Constitution.

The view that the protections of the Bill of Rights will apply to CWC inspections means that implementing legislation must bring the Constitution and the CWC into accord. While the potential constitutional issues generated by CWC inspections are unprecedented, this is not the first time that the United States government's constitutional obligations have confronted the interests of national security.

For example, the Foreign Intelligence Surveillance Act (FISA)<sup>68</sup> was passed in response to public alarm concerning warrantless intrusions by the Executive Branch into the privacy of Americans in its investigations of foreign espionage in the United States.<sup>69</sup> Congress fashioned a "secure framework by which the Executive Branch may conduct legitimate electronic surveillance for foreign intelligence purposes within the context of this Nation's commitment to privacy and individual rights."<sup>70</sup> In Congress' judgment, the court orders and other procedural safeguards laid out in the Act "are necessary to insure that electronic surveillance by the U.S. Government within this country conforms to the fundamental principles of the fourth amendment."<sup>71</sup> Every court to consider FISA has upheld it because

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65. *But see* Carnahan, *Chemical Arms Control, Trade Secrets, and the Constitution: Facing the Unresolved Issues*, 25 INT'L LAW. 167, 182 (1991): "the fourth amendment does not even apply to arms control inspections by such entities [international organizations], any more than it applies to searches by private individuals."

66. "The judiciary does have the authority to interpret treaties duly ratified by the Senate whenever the treaty is relevant to the resolution of a dispute over which the court has jurisdiction." M.C. BASSIOUNI, *supra* note 58, at 77.

67. *See generally* Tanzman, *Constitutionality of Warrantless On-Site Arms Control Inspections in the United States*, 13 YALE J. INT'L L. 21, 38-41 (1988).

68. 50 U.S.C. §§ 1801-1811.

69. Prior to the enactment of FISA, most courts had concluded that the President had the inherent power to conduct warrantless electronic surveillance to collect foreign intelligence information, and that such surveillances constituted an exception to the warrant requirement of the Fourth Amendment. *United States v. Truong Dinh Hung*, 629 F.2d 908, 912-14 (4th Cir. 1980), *later app.*, *United States v. Hung*, 667 F.2d 1105, *cert. denied*, 454 U.S. 1144 (1981); *United States v. Buck*, 548 F.2d 871, 875 (9th Cir.), *cert. denied*, 434 U.S. 890 (1977); *United States v. Butenko*, 494 F.2d 593, 605 (3d Cir.), *cert. denied*, *Ivano v. United States*, 419 U.S. 881 (1974); *United States v. Brown*, 484 F.2d 418 (5th Cir. 1973), *cert. denied*, *Brown v. United States*, 415 U.S. 960 (1974); *but see* *Zweibon v. Mitchell*, 516 F.2d 594, 633-51 (D.C. Cir. 1975) (dictum), *cert. denied*, *Barrett v. Zweibon*, 425 U.S. 944 (1976), *later app.*, *Re Zweibon*, 565 F.2d 742 (1977), *on remand*, *Zweibon v. Mitchell*, 606 F.2d 1172 (1978), *cert. denied*, 453 U.S. 912 (1981). The Supreme Court has expressly declined to address the issue. *United States v. United States District Court [Keith, J.]*, 407 U.S. 297 (1972).

70. S. Rep. No. 604, 95th Cong., 1st Sess. 15, *reprinted in* 1978 U.S. Code Cong. & Admin. News 3904, 3916.

71. S. Rep. No. 701, 95th Cong., 2d Sess. 13, *reprinted in* 1978 U.S. Code Cong. & Admin. News 3973, 3982. FISA authorizes a federal officer to apply to a judge of the specially created FISA Court for an order "approving electronic surveillance of a foreign power or an agent of a foreign power for the purpose of obtaining foreign intelligence information." The application must detail the identity of the target, the information relied on by the government to demonstrate that the target is a "foreign power" or an "agent of a foreign power," evidence that the

it is "a constitutionally adequate balancing of the individual's Fourth Amendment rights against the nation's need to obtain foreign intelligence information."<sup>72</sup>

The important point is that where Congress has identified a public policy that involves a tension between gathering intelligence for national security purposes and the interests of privacy protected by the Bill of Rights, it has successfully designed a system for balancing those concerns. When constitutional challenges to that system have come before the courts, the judicial response has been to accord great respect to Congress' intentions and to uphold the constitutionality of that system. Thus, carefully crafted legislation that strikes a reasonable balance between CWC verification activities and the Constitution will enable verification to proceed with strong legal support.

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place where the surveillance will occur is being used, or is about to be used by the foreign power or its agent, the type of surveillance to be used, the minimization procedures to be employed, and certification that the information sought is "foreign intelligence information." 50 U.S.C. § 1804 (a)(1-11). The FISA judge must make specific findings of probable cause. The evidence must show that there is probable cause to believe that the target of the electronic surveillance is a foreign power or an agent of a foreign power; if the target of surveillance is a United States citizen, the reason for being considered an agent of a foreign power must not solely be upon the basis of constitutionally protected activities. 50 U.S.C. § 1805 (a)(3)(A).

72. *United States v. Duggan*, 743 F.2d 59 (2d Cir. 1984). See also *United States v. Andonian*, 735 F. Supp. 1469 (C.D. Cal. 1990); *United States v. Falvey*, 540 F. Supp. 1306 (E.D.N.Y. 1982); *Re Kevork*, 634 F. Supp. 1002 (C.D. Cal. 1985), *aff'd*, 788 F.2d 566 (9th Cir. 1986); *United States v. Belfield*, 692 F.2d 141 (D.C. Cir. 1982).

## SECTION 4

### INSPECTIONS OF FEDERALLY OWNED OR RELATED FACILITIES

#### 4.1 NO CONSTITUTIONAL PROTECTIONS FOR FEDERALLY OWNED FACILITIES.

Routine and challenge inspections of federally owned and operated facilities will not create Fourth Amendment problems. "The national government itself has no constitutional rights, and it may agree to grant foreign inspectors access to government facilities, records, and weapons."<sup>73</sup> The point is not that the Fourth Amendment is inapplicable to CWC inspections, but that the United States government is, by definition, not a person within the constitution's protections. As a result, neither probable cause nor warrants are required, and the United States would not be entitled to interpose Fourth Amendment objections to applicable CWC inspections of its own facilities.

This assertion has significant consequences. Throughout the CWC negotiations, a significant issue has been the protection of national security information and the threat that CWC inspections might pose to that security.<sup>74</sup> These policy considerations are beyond the scope of this analysis, except to state that the issue has no Fourth Amendment implications as long as the subject of the inspection is a federally owned and operated facility.

#### 4.2 CONSENT TO CWC INSPECTIONS BY GOVERNMENT CONTRACTORS AND LICENSEES.

##### 4.2.1 Waivers of Fourth Amendment Rights.

Private facilities that hold government contracts can, under certain circumstances, be required to waive their constitutional rights as a condition of the relationship. In the area of contracts, the Supreme Court has upheld the federal government's authority to require consent by its contractors to warrantless inspections. In *Zap v. United States*,<sup>75</sup> the Court ruled:

[W]hen [Mr. Zap], in order to obtain the government's business, specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts.<sup>76</sup>

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73. Koplow, *Arms Control Inspection: Constitutional Restrictions on Treaty Verification in the United States*, 63 N.Y.U. L. REV. 229, 291 (1988) citing L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 390 (1972); D. ARONOWITZ, *LEGAL ASPECTS OF ARMS CONTROL VERIFICATION IN THE UNITED STATES* 103 (1965); L. DUNN & A. GORDON, *ON-SITE INSPECTION FOR ARMS CONTROL VERIFICATION: PITFALLS AND PROMISE* 40 (Center for National Security Negotiations Paper, vol. 1, no. 2, 1989). See *Davis v. United States*, 328 U.S. 582 (1946) (warrantless search of defendant's gasoline station office for gasoline rationing coupons, which were being used in a black marketing scheme, upheld in part because the coupons remained the property of the federal government even while in the possession of gasoline dealers).

74. See Lewis, *U.S. Now Prefers Limited Inspection of Chemical Arms*, N.Y. Times, Aug. 14, 1991, at 1, col. 3 (nat'l ed).

75. 328 U.S. 624 (1946), judgment vacated on other grounds, 330 U.S. 800 (1947) (per curiam).

76. *Id.* at 628.

Thus, the federal government may include provisions in its contracts or licenses<sup>77</sup> that wrest consent from its contractors to inspections relating to execution of those contracts; it is all part of the voluntary bargain.<sup>78</sup>

Similarly, the federal government can induce a permittee to report information about the activities covered by the permit. The court in *United States v. Geophysical Corp. of Alaska*<sup>79</sup> considered the constitutionality of the Outer Continental Shelf Lands Act (OCSLA),<sup>80</sup> which provides that the government issue geological exploration permits on the condition that permittees release data gathered under the permit to the Secretary of Interior for subsequent public disclosure. The court rejected the argument that requiring release without compensation effected an unconstitutional taking:

It is not a taking for the Government to withhold a benefit it is not contractually or constitutionally obliged to confer. . . . If the condition is rationally related to the benefit conferred, its imposition does not coerce the recipient to forego constitutional rights. This rational relation requirement prevents the government from using its greater bargaining strength to compel acquiescence in a matter not related to the parties' bargain.<sup>81</sup>

The court concluded that "the overall purpose of OCSLA was to allow for the orderly and productive development of energy resources. The compilation of data by the Secretary is an intrinsic part of this overall plan."<sup>82</sup>

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77. A license is a "permit, granted by an appropriate governmental body, generally for a consideration, to a person, firm, or corporation to pursue some occupation or to carry on some business subject to regulation under the police power." BLACK'S LAW DICTIONARY 920 (6th ed. 1991).

An exhaustive search has uncovered no case which specifically concerns the validity of a waiver of Fourth Amendment rights contained in a federal licensing scheme whose purpose is to extract such a waiver from a broad category of private businesses, as distinguished from a government contract that is separately negotiated by each contractor. A prominent authority on the Fourth Amendment suggests "that certain privileges, such as doing business with the government or obtaining a license from the government, may be conditioned upon the surrender of Fourth Amendment rights. . . ." See W. LAFAVE, SEARCH AND SEIZURE § 10.2(b), at 638 (2d ed. 1987).

78. *First Alabama Bank of Montgomery v. Donovan*, 692 F.2d 714 (11th Cir. 1982) (bank's signing contracts with the United States constituted consent to compliance reviews which employ reasonable searches); *United States v. Brown*, 763 F.2d 984 (8th Cir. 1985), *cert. denied*, *Brown v. United States*, 474 U.S. 905 (1985) (contract with state to sell prescription drugs to Medicaid patients constituted an explicit consent to periodic audits); *United States v. Griffin*, 555 F.2d 1323 (5th Cir. 1977) (pharmacist's contract with state to sell drugs to welfare recipients, wherein pharmacist voluntarily agreed to make such records available for inspection at any time, justified warrantless search).

79. 732 F.2d 693 (9th Cir. 1983).

80. 43 U.S.C. §§ 1331-1356.

81. 732 F.2d at 700, *quoting* *Portland General Electric Co. v. Federal Power Comm'n*, 328 F.2d 165, 173 (9th Cir. 1964).

82. *Id.* Using the same test, the Supreme Court analyzed whether First Amendment rights of commercial speech could be surrendered as a condition of a gambling permit. The Court upheld a ban on advertising gambling, finding that the restrictions were "no more extensive than necessary to serve the government's interest." *Posados de Puerto Rico Ass'n v. Tourism Co.*, 478 U.S. 328, 343 (1986).

However, it is a significant leap beyond *Zap* and *Geophysical Corp.* to conclude that the federal government can require all of its contractors and licensees to waive their rights against CWC inspections that might otherwise violate the Fourth or Fifth Amendment.<sup>83</sup> Although the case law is unsettled,<sup>84</sup> it is clear that there must be a rational relationship between the condition waiving the right and the government's regulatory interest.

In *Parks v. Watson*,<sup>85</sup> the court considered whether a city could legally extract free rights to a geothermal well from a developer in exchange for agreeing to sell adjoining public land to him. It ruled that the city could not deprive the developer of his right to fair compensation for the well, even though the city was not obliged to sell the land in the first place. The court ruled:

Since the requirement that [the developer] give its geothermal wells to the City had no rational relationship to any public purpose related to the [sale of the city's land to the developer], the unrelated purpose does not support the requirement that the company surrender its property without just compensation. . . . The condition violates the Fifth Amendment.<sup>86</sup>

Thus, the CWC inspection scheme can be imposed on federal contractors or licensees through these instruments only if their contract or license is rationally related to the purposes of the domestic legislation implementing the Convention.

#### 4.2.2 Recommendation to Require Consent to CWC Inspections.

Requiring consent to CWC inspections must be part of a consistent and objective national policy. The difficult task in applying this principle to the implementing legislation is to ascertain which federal contracts and licenses are rationally related to the purposes of the Convention. The national security interest in effective verification of the CWC should guide this determination. At a minimum, the *legislation should* provide that every facility with Schedule 1, 2 or 3 chemicals that is a government

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83. This refers to the unconstitutional conditions doctrine: "Even though a person has no 'right' to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, [it cannot do so] on a basis that infringes his constitutionally protected interests." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). See also *Carter v. Kentucky*, 450 U.S. 288 (1981); *Elrod v. Burns*, 427 U.S. 347 (1976).

84. "[T]he doctrine of unconstitutional conditions . . . roams about constitutional law like Banquo's ghost, invoked in some cases, but not in others." Epstein, *Forward: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 5, 10-11 (1989).

85. 716 F.2d 646, 653 (9th Cir. 1983).

86. *Id.* at 653.

contractor or licensee, as well as all contractors and licensees whose activities involve national security,<sup>87</sup> are subject to waivers.

The requirement for a contract clause consenting to all CWC inspections could be added to the Federal Acquisition Regulation (FAR),<sup>88</sup> which generally codifies federal contracting policies. The regulation can require that both appropriate federal contractors and subcontractors agree to the inspections.<sup>89</sup> The key change would be to specify that duly authorized CWC inspectors, as well as American in-country escorts and observers from the State Parties requesting inspections, shall be entitled to inspect the contractor's facilities and records pursuant to the CWC implementing legislation.

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87. The term "national security" is the proper governmental interest to assert as the legislative rationale for this waiver because arms control treaties are instruments of national security. "[T]he conviction that world order and national security are closely linked even if not identical objectives is steadily acquiring a place in orthodox thought about international relations." Claude, Jr., *Theoretical Approaches to National Security and World Order*, in NATIONAL SECURITY LAW 32 (1990). Nevertheless, the authors recognize that "the meaning of national security in American public policy cannot be captured by a single definition or criterion." Tipson, *National Security and the Role of Law*, *id.* at 3. Determination of exactly which government contracts would be included will require further research and elaboration.

88. 48 C.F.R. § 1.000 *et seq.*

89. W. KEYES, *GOVERNMENT CONTRACTS IN A NUTSHELL* 459 (1990).



## SECTION 5

### ROUTINE INSPECTIONS OF PRIVATE SCHEDULE 1 AND 2 FACILITIES

#### 5.1 DESCRIPTION OF ROUTINE INSPECTIONS.

Routine inspections of Schedule 1 and 2 facilities are designed to maintain constant and mandatory oversight where the consequences of noncompliance are most dangerous. The number, intensity and duration of routine inspections vary according to the risk to the objectives of the CWC posed by the chemicals at the facility, its characteristics, and the activities carried out there.<sup>90</sup> The CWC specifies procedures for notification, entry into the inspected State, and conduct of these inspections, as well as reports on their results. Each of these steps is premised on the policy that the State Party within which the facility is located must actively cooperate with the International Organization.

##### 5.1.1 Pre-Inspection Activities.

The inspection process begins when the Technical Secretariat designates inspectors for the task. A State Party may object to individual inspectors, but it must accept a sufficiently large group to conduct the prescribed number of inspections.<sup>91</sup>

The Director General of the Technical Secretariat must notify an inspected State prior to the planned arrival of the inspection team at the site and must specify the purpose of the inspection.<sup>92</sup> The State Party must provide the visas, documents, and safe conduct necessary to allow for the inspection team's multiple entry to and exit from the inspection site.<sup>93</sup> The host State Party also must provide various logistical support services for the inspection team, which the International Organization must reimburse.<sup>94</sup> Prior to each routine inspection, the inspectors are to be briefed by facility representatives at the site.<sup>95</sup>

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90. *Draft Convention*, *supra* note 1, app. I, Annex 1 to Article VI, Single Small-Scale Facility, ¶ II(3); Annex 2 to Article VI, ¶ 5(ii). These guidelines have yet to be developed.

91. Protocol on Inspection Procedures, *supra* note 1, pt. I, ¶ II(4), (6).

92. *Id.* pt. I, ¶ V(A). The Draft Convention is as yet unclear regarding how much notice the inspected State Party will be given or if notice may be shortened when necessary to resolve urgent problems. *Draft Convention*, *supra* note 1, app. I, Annex 2 to art. VI ¶ 11(a).

93. Protocol on Inspection Procedures, *supra* note 1, pt. I, ¶ III(1).

94. *Id.* ¶ IV(C). These include communications, interpretation services to assist in interviewing, transportation, work space, lodging, meals and medical care.

95. *Id.* ¶ V(C).

### 5.1.2 Conduct of Inspections.

Each State Party must negotiate with the Organization facility agreements on inspection procedures that will govern the conduct of inspections of each declared Schedule 1 and 2 facility.<sup>96</sup> Pursuant to these agreements, the inspection team must have unimpeded access to search the facility.<sup>97</sup> The model agreements<sup>98</sup> generally outline inspection procedures which may include observation of all activities at the facility,<sup>99</sup> examination of equipment, identification of any technological changes, examination of documentation and records, installation of monitoring equipment, validation of analytical equipment, and investigation of irregularities. Inspectors will be authorized to interview any facility personnel, inspect documentation and records, and take photographs of and samples from the facility.<sup>100</sup>

Representatives of the inspected State Party may accompany the inspection team at all times and have the right to request and receive copies of the information and data gathered about the facility.<sup>101</sup> If inspectors consider it necessary to their mission, they may request the designated representative of the facility to have a particular operation carried out to the extent possible.<sup>102</sup>

### 5.1.3 Reports.

Upon completion, the inspection team must meet with representatives of the inspected State Party and the inspected facility to share the preliminary written findings of the inspection.<sup>103</sup> Information that is determined to be confidential, either by the State Party or the Director General, will be securely stored by the Technical Secretariat in order to protect the identity of the facility to which it

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96. *Draft Convention*, *supra* note 1, app. I, Annex 1 to art. VI; Annex 2 to art. VI, ¶ 8. Because the facility agreements are to be completed within six months after the Convention enters into force and because the relevant language of the CWC article governing routine inspections states that these "agreements shall govern inspections at each facility," it appears that no routine inspections will take place before these facility agreements are in place. *See id.*

97. *Id.* Annex 2 to art. VI ¶ 11(b). The areas of a Schedule 2 facility to be inspected include: 1) areas where feed chemicals (reactants) are stored; 2) areas where manipulative processes are performed upon the reactants prior to addition to the reaction vessel; 3) feed lines to the reaction vessel (pursuant to 1 and 2 above) and any associated valves, flow meters, etc.; 4) the external aspect of the reaction vessel and its ancillary equipment; 5) lines from the reaction vessel leading to long- or short-term storage or for further processing of the designated chemicals; 6) control equipment associated with the above; 7) equipment for waste and effluent handling; and 8) equipment and areas for disposition of specified chemicals. *Id.* ¶ 10(i)-(viii).

98. *Id.* app. II, Models for Agreements, pt. A.

99. "Facility" is defined in app. II, Models for Agreements, pt. A, Explanatory Note ¶ 5, to include "[a]ll structures and buildings . . . associated with the production, consumption and processing of the declared chemical."

100. *Id.* ¶ VI(E)(1). Provision may also be made for the inspection team to take samples themselves. The general provisions for routine inspections make no restrictions on what kinds of media may be sampled.

101. *Id.* pt. I, ¶ VI(D)(5)-(6).

102. *Id.* ¶ VI(A)(3).

103. *Id.* ¶ VI(G)(1).

pertains.<sup>104</sup> The inspection team must prepare a final report based on the inspection's findings within 30 days and submit it to the inspected State Party, which in turn may annex comments.<sup>105</sup>

## 5.2 FOURTH AMENDMENT AND PERVASIVE REGULATION.

Routine inspections of private Schedule 1 and 2 facilities present two serious legal problems. First, because the Draft Convention does not specify that warrants be obtained for routine inspections, these searches may violate the Fourth Amendment if not excused from the warrant requirement.<sup>106</sup> Second, the National Authority will be unable to ensure the accuracy of the declarations it must make to the International Organization without being able to search the facilities itself. The "pervasively regulated industries exception" to the warrant requirement<sup>107</sup> is an option<sup>108</sup> for resolving both problems.

While commercial property is entitled to Fourth Amendment protections,<sup>109</sup> pervasively regulated industries have a reduced expectation of privacy.<sup>110</sup> Exactly what defines a pervasively regulated industry is unclear, but at a minimum there must be a legal regime that focuses on that industry directly.<sup>111</sup> The fact that an industry is subject to generally applicable safety or economic regulation

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104. *Draft Convention*, *supra* note 1, Annex on the Protection of Confidential Information, ¶ A(2)(e).

105. Protocol on Inspection Procedures, *supra* note 1, pt. I, ¶ VIII.

106. Tanzman & Kelman, *Legal Implementation of the Multilateral Chemical Weapons Convention: Integrating International Security with the Constitution*, 22 N.Y.U. J. INT'L L. & POLITICS 475, 497-98 (1990).

107. The pervasively regulated industries exception is premised on the notions that a warrant would undermine law enforcement, and that facility owners cannot help but be aware that their property will be subject to periodic inspections. *United States v. Biswell*, 406 U.S. 311, 316 (1972).

108. It may also be possible to address these problems by requiring private facilities to obtain federal licenses to possess Schedule 1 or 2 chemicals, with waiver of the right to privacy made an explicit condition of obtaining a license. Cf. B. CARNAHAN, *supra* note 38, at 10-11. The argument would be that conditioning a license on waiving the right to privacy is analogous to conditioning a government contract on such a waiver. See section 4.1.1, *supra*, and its discussion of *Zap v. United States*, 328 U.S. 624 (1946), *judgment vacated on other grounds*, 328 U.S. 800 (1947) (per curiam). However, the authors believe both that a licensing scheme would be considerably more burdensome to the affected industries and expensive to the federal government, and that it is constitutionally questionable. Therefore, this option is not proposed as a solution to the problems of warrantless routine inspections. Section 6.2.1.1.2, *infra*, analyzes this approach and its weaknesses in the more problematic context of challenge inspections of declared facilities.

109. *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 353 (1976).

110. *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970); *Donovan v. Dewey*, 452 U.S. 594, 606 (1980); *New York v. Burger*, 482 U.S. 691, 700 (1987).

111. Recently, the Tenth Circuit Court of Appeals in *V-1 Oil Co. v. Wyoming*, 902 F.2d 1482 (10th Cir. 1990), *cert. denied*, *V-1 Oil Co. v. Gerber*, 111 S.Ct. 295 (1990), held that gasoline dealers are pervasively regulated for purposes of a warrantless search by an agent of the Department of Environmental Quality concerning leakage from underground storage tanks. State law requires a license and payment of a fee before one may do business, violation of which is a misdemeanor; the price of gas must be displayed conspicuously; taxes must be collected; and station operators must, under federal but not state law, submit detailed reports. The "aggregation of requirements to which Wyoming gas stations are subject is equally intrusive" as that involved in *Burger*, held the court.

does not permit wide-scale warrantless searches.<sup>112</sup> Industries held to be pervasively regulated have involved either a danger to the public health or safety,<sup>113</sup> a link to crime,<sup>114</sup> or control over financial transactions.<sup>115</sup> Pervasively regulated industries may be inspected without warrants because requiring a warrant would give the subject of a search sufficient notice to conceal violations, rendering enforcement ineffective.<sup>116</sup>

It is not absolutely certain whether Schedule 1 and 2 facilities fall within the pervasively regulated industries exception. First, existing federal law does not pervasively regulate the facilities that might be included on Schedule 1 or 2.<sup>117</sup> Second, while the CWC specifies a highly detailed inspection program for Schedule 1 and 2 facilities, this international treaty directly regulates State Parties, not private facilities.<sup>118</sup> Therefore, the domestic implementing *legislation must* establish a comprehensive new scheme that pervasively regulates these facilities in order to subject them to warrantless inspections.

The Supreme Court in *New York v. Burger*<sup>119</sup> formulated a three part test that a warrantless inspection scheme must pass in order to comply with the Fourth Amendment:

- (1) there must be a substantial government interest that guides the regulatory scheme pursuant to which the inspection is made;
- (2) the warrantless inspections must be necessary to further the regulatory scheme; and

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112. *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978); *Brock v. Emerson Elec. Co.*, 834 F.2d 994 (11th Cir. 1987).

113. Nuclear power (*NRC v. Radiation Technology*, 519 F. Supp. 1266 (D.N.J. 1981)), day care providers (*Rush v. Obledo*, 756 F.2d 713 (9th Cir. 1985)), meat packing (*Western States Cattle Co. v. Edwards*, 895 F.2d 438 (8th Cir. 1990)), the food and drug industry (*United States v. New England Grocers Supply Co.*, 488 F. Supp. 230 (D. Mass. 1980)), mining (*Donovan v. Dewey*, 452 U.S. 594 (1980)), funeral parlors (*Cooley v. State Bd. of Funeral Directors & Embalmers*, 141 Cal. App.2d 936, 296 P.2d 588 (1956)).

114. Gun dealers (*United States v. Cerri*, 753 F.2d 61 (7th Cir. 1985)), firearm dealers (*United States v. Biswell*, 406 U.S. 311 (1972)), auto parts shops (*New York v. Burger*, 482 U.S. 691 (1987)), massage parlors (*Pollard v. Cockrell*, 578 F.2d 1002 (5th Cir. 1978)), gambling (*Serpas v. Schmidt*, 827 F.2d 23 (7th Cir. 1987)), strip bars (*Turner v. Dammon*, 848 F.2d 440 (4th Cir. 1988)), liquor sellers (*Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970)), pharmacies (*United States v. Nechy*, 827 F.2d 1161 (7th Cir. 1987)).

115. Banking (*United States v. Chuang*, 897 F.2d 646 (2d Cir. 1990)), commercial fishing (*Baggett v. State*, 722 S.W.2d 700 (Tex. Crim. 1987)).

116. *Donovan v. Dewey*, 452 U.S. 594, 602-03 (1980).

117. While drug manufacturing is a pervasively regulated industry, *United States v. Jamieson-McKarnes Pharmaceuticals*, 651 F.2d 532 (8th Cir. 1981), the few cases specifically concerning the chemical industry have not so held. The court in *New Mexico Env. Imp. Div. v. Climax Chem. Co.*, 733 P.2d 1322 (N.M. Ct. App. 1987), held that the limited circumstances that would justify a nonconsensual warrantless administrative inspection of business premises "are not present in this proceeding." Similarly, in *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986), the government did not contend nor did the Court hold that Dow was pervasively regulated.

118. *Draft Convention*, *supra* note 1, app. I, art. VI, §§ 3-7.

119. 428 U.S. 691 (1987).

- (3) the regulatory statute must perform the two basic functions of a warrant: (a) it must advise the owner of the commercial premises that the inspection is being made pursuant to the law and has a properly defined scope; and (b) it must limit the discretion of the inspecting officers.<sup>120</sup>

This test, as applied to the CWC in section 5.3, focuses on whether the regulatory system can carefully protect the facility owner's reasonable expectation of privacy by limiting inspections as to time, place and scope. The inspection program must define clearly what is to be searched, who can be searched, and the frequency of such searches. The inspection provisions must be tailored to the government's proper objectives, and must minimize the danger inherent in the unbridled exercise of administrative discretion.<sup>121</sup> Searches must be based on neutral criteria — a disproportionate pattern or number of searches may raise constitutional concerns for the simple reason that uncautioned authority is open to abuse.<sup>122</sup> Finally, there must be a definite timetable for inspections.<sup>123</sup>

Most schemes of pervasive regulation require disclosure of potentially sensitive information on their activities to responsible officials,<sup>124</sup> and courts have generally ruled that it is not an impermissible invasion of privacy for law enforcement agents to inspect those documents to determine the legality of commercial behavior.<sup>125</sup> Thus, in a pervasively regulated industry, office spaces and documents, which would otherwise be constitutionally protected, have a reduced expectation of privacy

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120. *Id.* at 702-03.

121. *Serpas v. Schmidt*, 827 F.2d 28 (7th Cir. 1987); *Bionic Auto Parts & Sales, Inc. v. Fahner*, 721 F.2d 1072, 1078-79 (7th Cir. 1983); *State v. VFW Post 3562*, 525 N.E.2d 773, 37 Ohio St.3d 310 (Ohio 1988).

122. *Turner v. Dammon*, 848 F.2d 440 (4th Cir. 1988).

123. A recurrent claim in suits challenging warrantless inspections has been the absence of any specific schedule that determines the frequency and the circumstances that will result in a search. Again, the recent decision in *V-1 Oil Co. v. Wyoming*, 902 F.2d 1482, 1486 (10th Cir.), *cert. denied*, *V-1 Oil Co. v. Gerber*, 111 S. Ct. 295 (1990), is informative. Having found gasoline stations to be pervasively regulated, the court struck down warrantless on-site inspections because the regulatory regime did not provide a constitutionally adequate substitute for a warrant: there was no notice to the owner of any particular business that its property will be inspected, and there was no "assurance of regularity" of inspections:

A warrant is required if searches are "so random, infrequent, or unpredictable that the owner, for all practical purposes has no real expectation that his property will from time to time be inspected by government officials. To satisfy the certainty and regularity requirement, an inspection program must define clearly what is to be searched, who can be searched, and the frequency of such searches.

902 F.2d at 1486.

124. *United States v. Morton Salt Co.*, 338 U.S. 632 (1950); *Matter of Establishment Inspection of Skil Corp.*, 846 F.2d 1127 (7th Cir. 1988).

125. No Fourth Amendment question is raised by the possibility that the combination of a recordkeeping requirement and the issuance of a subpoena to obtain those records permits the government to obtain private records without first procuring a warrant, *United States v. Miller*, 425 U.S. 435, 441 (1975), even if potentially sensitive information may be revealed, *Shapiro v. United States*, 335 U.S. 1 (1947); *Donovan v. Mehlenbacher*, 652 F.2d 228 (2d Cir. 1981). However, the right to collect and use such data for public purposes is typically accompanied by a concomitant duty to avoid unwarranted disclosures, *Whalen v. Roe*, 429 U.S. 589, 605 (1977).

due to the regulatory scheme.<sup>126</sup> However, even in a pervasively regulated industry, a commercial enterprise does not lose its privacy expectations in the records that must be inspected;<sup>127</sup> pervasive regulation which requires that records be compiled and maintained does not strip away altogether a company's interest in that information such that it may be subject to an unlimited warrantless search.<sup>128</sup> The information sought must be "sufficiently described and limited in nature, and sufficiently related to a tenable congressional determination as to improper use of transactions of that type."<sup>129</sup>

Warrantless inspections of commercial property may also be disallowed if such searches impermissibly extend into an area where the expectation of privacy is still reasonable. This is especially true for living spaces directly attached to commercial facilities -- although the warrantless search of the commercial space may be legitimate, the entry of inspectors into private living space is not.<sup>130</sup> Most important, even in an exclusively commercial setting, a search of the personal property of employees seriously implicates the Fourth Amendment's strictures. The Supreme Court has held:

Not everything that passes through the confines of the business address can be considered part of the workplace context. An employee may bring closed luggage to the office prior to leaving on a trip, or a handbag or briefcase each workday. While whatever expectation of privacy the employee has in the existence and the outward appearance of the luggage is affected by its presence in the workplace, the employee's expectation of privacy in the contents of the luggage is not affected in the same way. The appropriate standard for a workplace search does not necessarily apply to a piece of closed personal luggage, a handbag or a briefcase that happens to be within the employer's business address.<sup>131</sup>

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126. *United States v. Chuang*, 897 F.2d 646 (2d Cir.), *cert. denied*, 111 S. Ct. 77 (1990).

127. *Civil Aeronautics Bd. v. United Airlines, Inc.*, 542 F.2d 394 (7th Cir. 1976) (resort to compulsory legal process required in order for the U.S. Civil Aeronautics Board to gain access to records required to be maintained by carrier); *United States v. Stanack Sales Co.*, 387 F.2d 849 (3d Cir. 1968) (conviction for failure to permit an inspection of records under the Food, Drug and Cosmetic Act overturned because inspector lacked formal subpoena); *Mid-Florida Coin Exchange, Inc. v. Griffin*, 529 F. Supp. 1006 (M.D. Fla. 1981) (law enforcement officers preliminarily enjoined from enforcing state statute permitting warrantless access to required records of dealers in second-hand precious metals).

Two decisions involving pharmaceuticals are noteworthy for allowing searches of corporate records, *United States v. Nechy*, 827 F.2d 1161 (7th Cir. 1987), and collection of samples without a subpoena or a warrant, *United States v. Jamieson-McKames Pharmaceuticals*, 651 F.2d 532 (8th Cir. 1981), *cert. denied*, 455 U.S. 1010 (1982).

128. *McLaughlin v. Kings Island*, 849 F.2d 990 (6th Cir. 1988).

129. *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 67 (1974).

130. *Rush v. Obledo*, 756 F.2d 713 (9th Cir. 1985) (family day care providers are a pervasively regulated industry such as to permit warrantless inspections in areas of the home used by children when the children are present, but authorization of any time/any place warrantless inspections was overbroad). See also *Serpas v. Schmidt*, 827 F.2d 23 (7th Cir. 1987) (although horse racing is pervasively regulated, regulatory provision for searches of "other places of business" is too broad to permit searches of on-track dormitory rooms used as backstretchers' homes).

131. *O'Connor v. Ortega*, 480 U.S. 709, 716 (1987).

The right to conduct a warrantless inspection of a pervasively regulated industry does not include the right to enter by force. Although "the great majority of businessmen can be expected in normal course to consent to inspection without warrant,"<sup>132</sup> if the facility owner refuses access, judicial issuance of a warrant may be required before the inspection may proceed.<sup>133</sup> Typically in cases of resistance to a warrantless regulatory inspection, the inspecting agency seeks an administrative inspection warrant<sup>134</sup> through an "*ex parte*" proceeding,<sup>135</sup> which does not afford the facility owner an opportunity to challenge the grounds for the warrant until after the inspection is completed.<sup>136</sup>

The regulatory legislation may make refusal of entry an offense. However, a statute that provides for such penalties, without explicitly authorizing forcible entry,<sup>137</sup> precludes compulsory access.<sup>138</sup> Whether legislation could authorize the use of force to compel entry over resistance without recourse to a warrant is unclear.<sup>139</sup>

### 5.3 RECOMMENDATIONS TO ESTABLISH PERVASIVE REGULATION SCHEME.

Satisfaction of the first two parts of the *Burger* test, explained in section 5.2, requires adoption of implementing legislation, but that legislation alone cannot limit the discretion of the inspecting officers. Unless the Draft Convention's inspection procedures also perform "the two basic functions of a warrant," then the inspections might be unconstitutional. Because the specific details of the conduct of routine inspections are defined in the CWC itself, part three of the *Burger* test will be met only if the CWC

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132. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 316 (1977).

133. *New Mexico Env. Imp. Div. v. Climax Chem. Co.*, 733 P.2d 1322 (N.M. App. 1986).

134. Probable cause to believe a violation has occurred is not necessary to justify a warrant which may be issued on the basis of a reasonable governmental interest that justifies the decision to conduct the inspection in question. *United States v. Goff*, 677 F. Supp. 1526, 1534 (D. Utah 1987).

135. See generally Levitt, *FDA Inspections and Criminal Responsibility*, 1981 FOOD DRUG COSMETIC L.J. 469, 474 (1981).

136. *Boliden Metech v. United States*, 695 F. Supp. 77 (D.R.I. 1988). Most litigation challenging whether a scheme of pervasive regulation authorizes warrantless inspections arises when the facility owner acquiesces to the search but seeks to exclude the evidence obtained from that search on the grounds that it proceeded illegally. Alternatively, a person subject to a statute authorizing searches without a warrant or probable cause may bring a declaratory action contesting the statute's constitutionality and seeking an injunction to bar its implementation. *Illinois v. Krull*, 107 S.Ct. 1160, 1169 (1987).

137. No pervasive regulation statute explicitly so authorizes.

138. *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1969).

139. The court in *United States v. Jamieson-McKames Pharmaceuticals*, 651 F.2d 532, 540 n. 16 (8th Cir. 1981), suggested in a footnote that Congress may authorize forcible entry: "[I]f consent is refused after a notice of inspection is served, the refusal of consent may be separately prosecuted, but entry cannot be forced without a warrant. This result follows not because Congress *could not* authorize entry under a notice of inspection over objection, but because, in the food-and-drug area, just as in the liquor area, it *has not* done so." By contrast, the court in *Boliden Metech v. United States*, 695 F.Supp. 77, 80 (D.R.I. 1988), citing *See v. City of Seattle*, 387 U.S. 541, 545 (1966), stated that entry "may only be compelled through prosecution or physical force within the framework of a warrant procedure." "Thus," continued the *Boliden* court, "a statute which authorizes nonconsensual, warrantless entry would be unconstitutional."

routine inspection scheme itself establishes that inspections will be certain and regular and will not exceed constitutional boundaries. Thus, implementation of CWC routine inspections requires both domestic legislation and, within the Draft Convention, more definite limits on the discretion of inspectors.

### 5.3.1 Substantial Government Interest to Guide the Regulatory Scheme.

**5.3.1.1 Government Interest in the CWC.** Courts will look to the "findings and purpose" clause to identify the governmental interest that must satisfy the first part of the *Burger* test.<sup>140</sup> The Nuclear Non-Proliferation Act of 1978 (NNPA)<sup>141</sup> provides a model for this clause.

In sections 2 and 3 of the NNPA, Congress found that "the direct capability to manufacture or otherwise acquire [nuclear explosive] devices poses a grave threat to the security interests of the United States. . . ."<sup>142</sup> An analogous finding in the CWC implementing *legislation should* establish that mere acquisition of chemical weapons or their key precursors threatens national security, and, therefore, efforts to regulate industrial activity must supplement agreements controlling the actual hostile use of such weaponry. Moreover, it should acknowledge that the United States has been committed to controlling chemical weapons at least since it approved the Geneva Protocol in 1975.<sup>143</sup>

The NNPA also serves as a model of how Congress can state the purpose of the implementing statute. Section 3202 of the NNPA endorses "a more effective framework for international cooperation."<sup>144</sup> A major responsibility of this enforcement body is to implement "a comprehensive safeguards system administered . . . to deter proliferation."<sup>145</sup> Similarly, the implementing *legislation should* assert the commitment of the United States to the International Organization and should affirm that its inspection system is essential to United States compliance with the objectives of the Convention.<sup>146</sup>

**5.3.1.2 Government Interest in a Pervasive Regulatory Scheme.** The CWC requires the United States to report annually to the International Organization all facilities that produce scheduled chemicals and to facilitate on-site monitoring by the International Organization. Therefore, the *legislation should* state that a domestic regulatory scheme to fulfill these obligations is essential to CWC compliance.

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140. "Courts will give great weight to both statements of facts and declarations of policy which indicate that the legislature considered the proposed legislation and, cognizant of the issue, determined that the statute was reasonable." N. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 20.04, at 84 (4th ed. 1985).

141. 22 U.S.C. §§ 3201 *et seq.*

142. *Id.* § 3201.

143. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, (*entered into force for the United States* April 10, 1975), *supra* note 3.

144. 22 U.S.C. § 3202.

145. *Id.* § 3241.

146. It should be noted that Schedule 1 and 2 facilities, like firearm dealers and drug manufacturers, will be regulated in order to preclude their manipulation for illegal purposes -- the motive for pervasive regulation that receives the greatest judicial appreciation.



To comply with this obligation, the implementing *legislation should* create a National Registry for CWC scheduled facilities.<sup>147</sup> Any facility possessing a Schedule 1, 2 or 3 chemical should be required to provide the National Authority with sufficient information to make annual declarations in compliance with its CWC obligations.

The *legislation should* also empower the National Authority to check the accuracy of the information it collects. The implementing *legislation should* authorize regulations requiring operators of declared facilities to maintain such records with respect to their operations and the reports they file as the National Authority deems necessary for effective enforcement of the implementing legislation. Records required under this subsection should include only information related to the purposes of the CWC. Regulations requiring disclosure of these records should prescribe the procedure for their submission to the National Authority and should identify to the fullest extent practicable what information must be submitted. In addition, the *legislation could* authorize the National Authority to formulate a national plan for monitoring activities at Schedule 1 and 2 facilities. Such monitoring could include, but not be limited to, monitoring in air, soil, water, and plants, as well as quantifying chemical emissions and identifying their sources.<sup>148</sup>

### 5.3.2 Necessity of Warrantless Inspections.

Because the inspection scheme requires separate warrantless inspections by both the International Organization and the National Authority, the implementing legislation must justify both. First, *legislation should* provide that CWC routine on-site inspections of Schedule 1 and 2 facilities may be conducted by international inspectors without warrants or judicial interference. This provision should be based on findings that: (1) to require the evidence of probable cause that is a necessary prerequisite for a warrant could obligate foreign State Parties to reveal confidential intelligence sources and methods; (2) a warrant requirement could undermine the confidence that foreign State Parties can expect the United States to observe the same standards as other signatories; and (3) most important, the possibility that a judge might deny a warrant request could force a breach of the Convention's verification provisions — thus, the procedures for administrative warrants, discussed below in section 6.2.2,<sup>149</sup> cannot apply to routine inspections.

Second, the implementing *legislation should* provide that warrantless searches of facility records by the National Authority are necessary to assure the accuracy of its annual declarations to the International Organization. This provision should be based on findings that: (1) the National Authority is responsible for assuring United States compliance with the CWC; and (2) the possibility that a judge might deny a warrant request by the National Authority could force a breach of the Convention's provisions by preventing timely assurance of the accuracy of its declarations to the International Organization.

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147. See 7 U.S.C. §§ 136a, 136a-1, 136e providing for the registration, with the U.S. Environmental Protection Agency, of pesticides (§ 136a) and establishments (§ 136e) under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).

148. See 33 U.S.C. § 1318(a)(A) permitting inspectors to install, use and maintain monitoring equipment and to sample effluents under the Clean Water Act.

149. The process of obtaining administrative warrants necessarily raises the possibility that the requested magistrate will deny the request and thereby prohibit any inspection that requires the issuance of a warrant to be constitutionally permissible. See section 6.2.2, *infra*.

### 5.3.3 Constitutionally Adequate Substitute for a Warrant.

**5.3.3.1 Advise Owners.** The owner of the facility should be advised that CWC inspections are conducted pursuant to the implementing legislation both by the terms of the legislation itself and by the notice with which he or she is presented when inspected. Most important, the *legislation should* state that routine inspections and monitoring will take place in accordance with the CWC by the International Organization, and should explicitly incorporate by reference those verification provisions. In addition, the *legislation should* confer on the National Authority the power to conduct warrantless searches of facility records to confirm the information provided to the National Registry. These clauses will assure that Schedule 1 and 2 facility owners are on notice through the implementing legislation and through the CWC that their facilities are being inspected pursuant to law.

In order to guarantee that actual notice is given to each facility owner, the *legislation should* also provide that, before undertaking an inspection, the National Authority must present to the owner, operator or agent in charge of the facility appropriate credentials and a written statement of the reason for the inspection. This should include a statement as to whether a violation of the law is suspected.<sup>150</sup> A separate notice should be given for each new inspection.

**5.3.3.2 Limit Discretion of Inspecting Officers.** The *legislation should* provide that routine inspections and monitoring may be conducted by the Technical Secretariat only in accordance with the CWC and the facility agreements that delineate its verification activities. Similarly, the *legislation should* limit warrantless inspections by the National Authority to what is necessary to assure that the United States meets its CWC obligations to the International Organization.<sup>151</sup>

As previously stated, it is necessary that the Draft Convention and its facility agreements properly regulate routine inspections so that the inspectors -- whether from the International Organization or the National Authority -- will not be authorized to exercise more discretion than the Fourth Amendment allows. The critical question is whether the CWC specifies that a scheduled facility will be searched in a manner that is limited as to time, place and scope.

#### Assure Certain and Regular Inspections

Unfortunately, the Draft Convention's routine inspections are not part of a certain and regular search scheme. Nothing in these provisions explicitly states how often these facilities should anticipate inspections, nor are inspections limited to ordinary business hours.<sup>152</sup> Consequently, a court could find that the regime does not provide notice to the owner of a particular business that it will be inspected from time to time by international officials.

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150. See 7 U.S.C. § 136g(a)(2) requiring the presentation of appropriate credentials and a written statement prior to the initiation of an inspection under FIFRA.

151. The implementing legislation should not attempt to define the time, place or scope of routine inspections. This risks inconsistency between judicial interpretation of the legislation and interpretation of the CWC text by the International Organization.

152. Indeed, the relevant language lists so many different factors to be considered that it virtually negates certainty and regularity. *Draft Convention, supra* note 1, app. II, Possible Factors Identified to Determine the Number, Intensity, Duration, Timing and Mode of Inspections of Facilities Handling Schedule 2 Chemicals.

The Draft Convention could be made to satisfy part 3 of the requirements of the *Burger* test by specifying the frequency of routine inspections in both annexes corresponding to Schedule 1 and Schedule 2 facilities inspections, respectively:

- (1) The Verification provisions of Annex 1 to Article VI should require that facility agreements contain a timetable for routine inspections of Schedule 1 facilities. Each facility agreement should contain the following clause: *Number and modalities of systematic inspections: The number and modalities of systematic inspections will be decided by the Technical Secretariat on the basis of guidelines but shall be conducted at \_\_\_\_\_ intervals for each Schedule 1 facility.*<sup>153</sup>
- (2) The Obligation and Frequency provisions of Annex 2 to Article VI should contain guidelines that specify the frequency of inspection of Schedule 2 facilities. The final sentence of Paragraph 5(ii) of that section should be modified to read: *The guidelines to be used shall include: Schedule 2 facilities shall be subject to routine inspection at \_\_\_\_\_ intervals.*

#### Limit Inspections of Documents and Records

The CWC provides that inspectors may "inspect documentation and records they deem relevant to the conduct of their mission."<sup>154</sup> By leaving the scope of inspection entirely in the discretion of the inspectors and by omitting any requirement that the searched documents be reasonably connected to the information that must be reported, the Draft Convention raises a potential Fourth Amendment problem.

Paragraph VI(D)(3) of Part I of the Protocol on Inspection Procedures should be modified in order to limit searches of commercial documents. This should be done by replacing the subjective standard of the Draft Convention (what the inspectors deem relevant) with a limit on searches of commercial documents that is objectively linked to the requirements of what information must be declared for each facility. Paragraph VI(D)(3) should be modified to read: *Inspectors shall have the right to inspect documentation that is relevant to the declaration requirements of the inspected facility.* In view of the breadth of the Draft Convention's reporting requirements, this is not an undue limitation, but it establishes an outer boundary of what may be inspected that is consistent with the Fourth Amendment and does not allow the inspectors unbridled discretion.

Even with this limitation on the inspectors' discretion, there still remains the question of how to resolve a dispute between the inspection team and the inspected State Party or a private facility owner as to whether identified documents are, in fact, relevant to the declaration requirements. Such disputes must be resolved in favor of permitting access to the documents. To protect the rights of inspected parties, accurate records must be maintained of what documents are searched; where subsequent review demonstrates that inspected documents were not relevant, those parties injured by the improper or excessive inspection should be entitled to a damages remedy as discussed in section 8.<sup>155</sup>

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153. See *id.* Models for Agreements, pt. B(2) and pt. C(3).

154. Protocol on Inspection Procedures, *supra* note 1, pt. I, ¶ VI(D)(3).

155. See section 8.1.2, *infra*.

### Exempt Personal Property from Inspections

No language in the Draft Convention explicitly limits routine inspections to exclude personal property. The Draft Convention could be made to satisfy this aspect of the Fourth Amendment by altering several sections of the CWC. First, Section 10 of Article VI should be modified to read: *For the purposes of on-site verification, each State Party shall grant to the inspectors access to facilities as required in the Annexes to this Article. Such access shall not extend to the living spaces or personal effects of private individuals.* Second, a definition of "facility" should be added to Article II. That definition should occur at some point prior to Paragraph 4 and should include a clause stating: *Facilities shall not include the living spaces and personal effects of private individuals.*

Finally, the last sentence of Paragraph VI(D)(1) of Part I of the Protocol on Inspection Procedures should be modified to read as follows: *The items to be inspected will be chosen by the inspectors but shall not include the living spaces or personal effects of private individuals.* These modifications will clearly indicate to the Technical Secretariat and the inspection team that they are not empowered to search personal property.

### Provide for Compelled Entry

In order to guarantee that inspectors will have access to declared facilities without requiring that approval be obtained by a judge or magistrate, the *legislation should* provide that access to a declared facility during a routine inspection may, if necessary, be compelled by the use of reasonable force exercised by the National Authority.

An alternative to authorizing the use of force would be to simplify the process for obtaining an *ex parte* administrative warrant such that its procurement does not interfere with CWC compliance. Accordingly, the *legislation should* authorize any federal judge or magistrate to issue an inspection warrant upon presentation of appropriate credentials as well as proof that the facility in question is in fact a declared facility. In this context, probable cause for the search would be statutorily defined as being on a list of CWC-declared facilities.

## SECTION 6

### CHALLENGE INSPECTIONS OF PRIVATE FACILITIES

Challenge inspections of private facilities present two serious legal problems. First, as with routine inspections, the absence in the Draft Convention of a provision requiring procurement of a search warrant prior to an inspection implicates the Fourth Amendment's prohibition against warrantless searches. Second, specific provisions in the Draft Convention regarding measures to secure inspected sites raise Fourth Amendment issues concerning detention of vehicles as well as persons and the permissible extent of monitoring.

#### 6.1 DESCRIPTION OF CHALLENGE INSPECTIONS.

Short notice inspections on demand, or "challenge inspections," are the means of verification conducted pursuant to Article IX to clarify and help resolve any matter that may cause suspicion about compliance with the CWC.<sup>156</sup> A State Party may request the Director General of the Technical Secretariat to act immediately to resolve any doubts.<sup>157</sup> Challenge inspections will proceed at any location without delay.<sup>158</sup>

While the specific mechanisms for challenge inspections distinguish between declared and undeclared facilities, their central features are identical.<sup>159</sup> The challenged State Party is obliged to

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156. The Protocol on Inspection Procedures, *supra* note 1, defines a "challenge inspection" as an inspection of a State Party requested by another State Party pursuant to Article IX, pt. II, which governs the procedure for clarifying and resolving "any matter which may cause doubt about compliance" with the convention. *Draft Convention, supra* note 1, app. I, art. IX. The July 15 Working Paper rephrases this clause to read "for the purpose of clarifying and resolving any questions concerning compliance with the provisions of the Convention." *July 15 WP -- Art. IX, supra* note 1, art. IX, § 1. Unresolved issues not reconciled by the current Working Papers remain in *Draft Convention, supra* note 1, app. II, Outcome of the Open-Ended Consultations on Article IX, pt. 2: On-Site Inspection on Challenge.

157. The request for a challenge inspection must contain the following information: (1) the State Party to be inspected and the Host State (if applicable); (2) the concern regarding compliance with the Convention including a specification of the relevant provision and the nature of the suspected noncompliance; (3) the point of entry to be used; (4) the size of the inspection site; (5) the names of the observers of the challenging State Party; and (6) any other information the requesting State Party may deem necessary. *July 15 WP -- Protocol, supra* note 1, pt. III, ¶ II(A)(1)(a)-(f).

158. *July 15 WP -- Art. IX, supra* note 1, ¶ 1.

159. The *July 15 WP -- Art. IX, supra* note 1, presents the United States' position on challenge inspections of both declared and undeclared facilities. The details for inspections of undeclared facilities is contained in *July 15 WP -- Protocol, supra* note 1. The mechanism for challenge inspections of declared facilities is presented in *August 6 WP, supra* note 1. Unlike the July 15 Working Paper, the August 6 Working Paper is not self-contained. Instead, it cross-references pt. III, ¶ III(B)(3) and (4) of the July 15 WP -- Protocol, *supra* note 1, for the corresponding provisions of some, but not all, of the requisite inspection procedures. *August 6 WP, pt. A.* In view of the fact that the July 15 WP -- Protocol by its title applies only to undeclared facilities, it is assumed for this report that all other procedures for challenge inspections of declared facilities would be taken from the Protocol on Inspection Procedures, *supra* note 1. In general, this means that challenge inspections of declared facilities are to be more intrusive than of undeclared facilities.

allow the inspection team access within the requested site,<sup>160</sup> and it must enable the inspection team to fulfill its duties under the Protocol on Inspection Procedures.<sup>161</sup> A challenging State Party is permitted to observe an inspection.<sup>162</sup>

Challenge inspections of declared facilities will be more intrusive than of undeclared facilities. In general, these challenge inspections would require "unimpeded access" within the boundaries of areas included within existing facility agreements.<sup>163</sup> However, access beyond what is granted to inspectors for routine inspections may be limited by various shrouding measures.<sup>164</sup> Further, the Draft CWC contemplates that a challenged State Party may deny access to some areas because it provides for the challenged State Party to make "every reasonable effort" to satisfy compliance concerns where it restricts or denies access.<sup>165</sup>

The most important difference between challenge inspections of undeclared and declared facilities is that a State Party must grant access to undeclared facilities only to the extent that is consistent with its proprietary rights, its legal obligations and national security;<sup>166</sup> no comparable restriction would be permitted of inspections of declared facilities. Presumably, this means that challenge inspections of undeclared facilities may be refused if the search would be unconstitutional, whereas challenge inspections of declared facilities are not refuseable.<sup>167</sup>

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160. *July 15 WP – Art. IX, § 3.*

161. *Id.* § 1.

162. *Id.* § 4.

163. *August 6 WP, supra* note 1, pt. A.

164. *Id.*, *citing* *July 15 WP – Protocol, supra* note 1, pt. III, ¶ III(B)(3).

165. *Id.*, *citing* *July 15 WP – Protocol, supra* note 1, pt. III, ¶ III(B)(4).

166. "In meeting the requirement to provide access within the requested perimeter, the challenged State Party will be under a treaty obligation to allow the greatest degree of access taking into account proprietary rights, legal obligations and national security." *July 15 WP – Protocol, supra* note 1, ¶ III(B)(1).

167. The authors assume (as confirmed by government sources) that "legal obligations" is meant to limit challenge inspection activities to what is consistent with the United States Constitution. Consequently, the United States need not allow challenge inspections that would violate the Bill of Rights, and its refusal to do so would not constitute noncompliance with the CWC. *See generally* Lewis, *U.S. Now Prefers Limited Inspection of Chemical Arms*, N.Y. Times, Aug. 14, 1991, at 1, col. 3 (nat'l ed).

### 6.1.1 Notification.

The Director General must give prompt notice to the requesting State Party, not less than 12 hours prior to the planned arrival of the inspection team at the point of entry, that it has received a request for a challenge inspection of either a declared<sup>168</sup> or undeclared<sup>169</sup> facility. The remainder of the notification procedures for inspections of declared facilities are unspecified.<sup>170</sup> Once the inspection team<sup>171</sup> arrives at the point of entry, the requesting State Party has 24 hours to inform both the inspection team and the inspected State Party of the inspection site and the nature of the suspected violation.<sup>172</sup>

### 6.1.2 Securing the Site.

The provisions for securing the challenged facility are intended to detect the escape of contraband.<sup>173</sup> Upon arrival at the site of a declared facility and up to the completion of the inspection, the inspection team may take several measures to secure the site. The inspection team may patrol the perimeter of the site, station personnel at the exits, inspect any "means of transport" of any State Party<sup>174</sup> leaving or entering the site in order to prevent the removal or destruction of relevant material, or may stop any such transport from leaving the inspection site during the course of the inspection.<sup>175</sup> The inspection team may use any appropriate equipment to monitor the perimeter of the site.<sup>176</sup>

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168. Protocol on Inspection Procedures, *supra* note 1, pt. III, ¶ II(A)(4). At the same time, the Director General must notify the Executive Council of the request.

169. July 15 WP -- Protocol, *supra* note 1, pt. III, ¶ II(A)(3). Again, the Director General must simultaneously notify the Executive Council of the request.

170. Bracketed material is included in the Protocol on Inspection Procedures, *supra* note 1, specifying that once the inspection team arrives, the requesting State Party has 24 hours to inform both the inspection team and the inspected State Party of the inspection site and the nature of the suspected violation. Protocol on Inspection Procedures, *supra* note 1, pt. III, ¶ II(A)(5). However, this material is not a formal part of the rolling text itself.

171. All challenge inspections must be performed by at least five inspectors selected from those used for routine inspections. *Id.* pt. III, ¶ I(1)-(2).

172. July 15 WP -- Protocol, *supra* note 1, pt. III, ¶ III(B)(2).

173. *See id.* pt. III, ¶ II(E).

174. Protocol on Inspection Procedures, *supra* note 1, pt. III, ¶ II(C)(2). It is unclear from the Draft Convention whether the "means of transport" that would be subject to search could be of any State Party or only of the inspected State Party. Furthermore, it is uncertain whether the phrase "means of transport of [a] State Party" includes privately owned vehicles. Prudence dictates that this analysis assume the broadest interpretation, i.e., that such vehicles would be subject to the site security mechanisms attendant to challenge inspections.

175. *Id.*

176. *Id.*

Activities to secure an undeclared facility must begin no later than 24 hours after specification of the challenged site. First, the operators of the challenged site must identify all exit points and provide the inspection team with evidence of all vehicular exit activity.<sup>177</sup> Once the inspection team arrives at the relevant perimeter, exit monitoring may begin.<sup>178</sup> Personnel and vehicles entering the site will not be subject to inspection, nor will personnel and passenger vehicles exiting the site.<sup>179</sup>

### 6.1.3 Perimeter Activities.

The "final perimeter" of a challenged undeclared facility is determined in an intricate process of negotiation between the inspection team and the challenged State Party.<sup>180</sup> Figure 1 depicts the process for challenge inspections of undeclared facilities, including determination of the "final perimeter" of the challenged site. Perimeter activities will continue throughout the inspection within a fifty meter band surrounding the perimeter and may include access to structures within the perimeter.<sup>181</sup> Inspectors at perimeters may monitor, take wipes, air, soil or effluent samples, and may conduct additional agreed upon activities.<sup>182</sup>

Perimeter determination for challenge inspections of declared facilities is an entirely different procedure. Where the challenged facility is already subject to a facility agreement and the requested perimeter is contained within or conforms to the perimeter in the facility agreement, the declared perimeter automatically becomes the final perimeter.<sup>183</sup> Perimeter sampling and monitoring are permitted as specified for challenge inspections of undeclared facilities.<sup>184</sup>

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177. July 15 WP -- Protocol, *supra* note 1, ¶ II(E)(1). Evidence of vehicular exit activity must consist of at least one of the following: traffic logs, photographs, video recordings, chemical evidence equipment to be provided by the inspection team, and allowing a member of the inspection team to observe (but not interfere with) exit activity.

178. Exit monitoring may consist of shrouding of equipment, sensors, random selective access and sample analysis. *Id.* ¶ II(E)(2).

179. *Id.* ¶ II(E)(3)-(4).

180. *See id.* pt. I, ¶ I; pt. III, ¶ II(B)(4)-(5); pt. III, ¶ II(C).

181. *Id.* pt. III, ¶ II(F)(3).

182. *Id.* ¶ II(F)(2).

183. August 6 WP, *supra* note 1, Perimeter Determination. No corresponding procedure is presented in this document for determining the final perimeter at a challenged facility not subject to a facility agreement (e.g., a Schedule 3 facility). *See id.* Presumably, this implies that the perimeter would be specified entirely by the requesting State Party in the initial notification to the Director General. *See* Protocol on Inspection Procedures, *supra* note 1, pt. III, ¶ II(A)(2).

184. July 15 WP -- Protocol, *supra* note 1, pt. III, ¶ II(F)(2).



# CHALLENGE INSPECTION FLOW CHART

## LEGEND:

IT = INSPECTION TEAM  
CG = CHALLENGING  
CD = CHALLENGED  
NMT = NOT MORE THAN  
NLT = NO LESS THAN

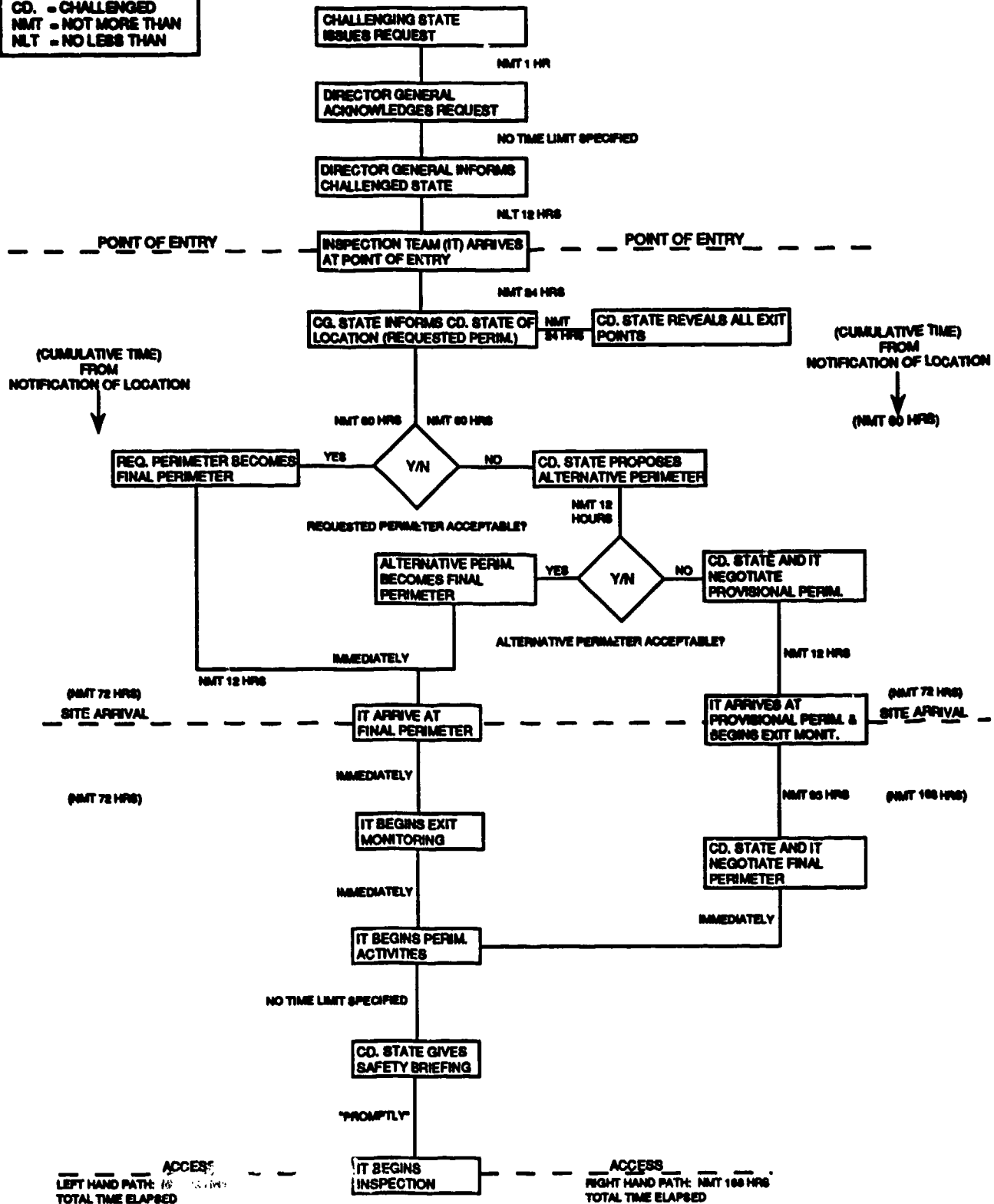


Figure 1. Flow Chart Depicting Challenge Inspections of Undeclared Facilities (Based on: Working Paper on the Draft Convention of Australia, Japan, the United Kingdom of Great Britain and Northern Ireland & the United States of America, U.N. Doc. CD/CW/WP.352, July 15, 1991).

#### 6.1.4 Pre-Inspection Briefing and Inspection Plan.

At a pre-inspection briefing, the inspected State Party may indicate to the inspection team the equipment, documents and areas it considers sensitive and not related to the purposes of the inspection, and will brief the team on the physical layout or other characteristics of the site.<sup>185</sup> The inspectors shall consider these proposals to the extent they deem them appropriate to the inspection.<sup>186</sup> The inspection team, assisted by the challenged State Party and facility representatives,<sup>187</sup> is responsible for preparing an inspection plan for each facility<sup>188</sup> that specifies the upcoming inspection activities.<sup>189</sup>

#### 6.1.5 Conduct of Inspections.

**6.1.5.1 In General.** The inspection itself must proceed according to a definite agenda. The inspection team is to arrive at the perimeter of the challenged declared facility no more than 12 hours after the requesting State Party specifies its location.<sup>190</sup> At inspections of undeclared facilities, the challenged State Party shall provide access within the requested perimeter as soon as possible, but not later than 168 hours (one week) after specification of the challenged site.<sup>191</sup> In the course of any challenge inspection, the inspectors may take any air, soil or effluent samples.<sup>192</sup> The inspection team shall use only the least intrusive methods needed to provide sufficient facts to clarify doubts about compliance,<sup>193</sup> using only methods necessary to gather information and proceeding to more intrusive procedures only as it deems necessary.<sup>194</sup>

**6.1.5.2 Managed Site Access.** "Managed access" is a special procedure included in the Draft Convention to protect sensitive areas of inspected sites. Access within the final perimeter of declared facilities with facility agreements in place (i.e., Schedule 1 or 2 facilities), shall be unimpeded within the boundaries established by the agreements;<sup>195</sup> in other words, these facilities are not entitled to the protection afforded by managed access. For declared facilities without facility agreements (including Schedule 3 facilities), the inspected State Party may take measures to protect sensitive installations and

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185. Protocol on Inspection Procedures, *supra* note 1, pt. III, ¶ II(D)(1). This applies also to inspections of undeclared facilities, July 15 WP – Protocol, *supra* note 1, pt. III, ¶ III(G)(2).

186. *Id.*

187. *Id.* ¶ III(G)(1).

188. For declared facilities, *id.* (D)(2). For undeclared facilities, *id.* ¶ III(G)(3).

189. *Id.* ¶ III(G)(3).

190. August 6 WP, *supra* note 1, Perimeter Determination.

191. July 15 WP – Protocol, *supra* note 1, pt. III, ¶ III(A)(1).

192. *Id.* ¶ III(D).

193. *Id.* ¶ III(A)(3). Inspectors must not engage in activities not relevant to their mission and may employ more intrusive procedures only when necessary.

194. *Id.* ¶ III(A)(4).

195. August 6 WP, *supra* note 1, Access within Final Perimeter.

prevent disclosure of confidential data not related to chemical weapons.<sup>196</sup> These measures may include removal and securing sensitive papers, shrouding sensitive displays and sensitive pieces of equipment, and logging off computer systems.<sup>197</sup> The inspected State Party bears the burden of demonstrating to the inspection team that a protected object has not been designed, built or used for the suspected activity that gave rise to the inspection request.<sup>198</sup>

Managed access measures may also apply to undeclared facilities. In addition to the steps specified for declared facilities, the challenged State Party may restrict sample analysis to appropriate element-specific on-site tests except where suitable facilities are not provided.<sup>199</sup> To the extent access is restricted, the challenged State Party must make every effort to demonstrate compliance by alternative means.<sup>200</sup> The challenged State Party must provide at least some access within the requested perimeter (the perimeter designated by the challenging State), including: (1) access within the requested perimeter; (2) aerial access to the requested perimeter; (3) observation from an elevated platform; or (4) use of tamper-evident sensors designed to detect relevant chemicals.<sup>201</sup> As with undeclared facilities, the challenged State Party must demonstrate that any object, building, structure, container or vehicle to which the inspection team has not had full access is not being used for purposes related to the compliance concern raised in the inspection request.<sup>202</sup>

#### 6.1.6 Reports.

Following completion of a challenge inspection of either an undeclared<sup>203</sup> or declared<sup>204</sup> facility, the inspectors must prepare a preliminary inspection report. The inspection report will summarize the inspection activities and factual findings of the inspection team regarding suspected noncompliance.<sup>205</sup> The inspected State Party is entitled to review the resulting draft final report within

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196. Protocol on Inspection Procedures, *supra* note 1, pt. III, ¶ III(B)(2).

197. *Id.*

198. *Id.* ¶ III(B)(3). Proof of this may be accomplished by partial removal of the shroud, for example. If the inspection team is satisfied that the object has not been designed for some suspected activity, then there will be no further inspection of that object. The same holds true for shrouded areas, structures or containers whose uses can be verified by partial visual inspection by the inspection team. The procedures for inspecting these materials have yet to be specified.

199. July 15 WP – Protocol, *supra* note 1, pt. III, ¶ III(B)(3).

200. *Id.* ¶ III(B)(4).

201. *Id.* ¶ III(B)(5).

202. *Id.* ¶ III(A)(2).

203. *Id.* ¶ V.

204. Protocol on Inspection Procedures, *supra* note 1, pt. III, ¶ V(B).

205. *Id.* ¶ V(A); July 15 WP – Protocol, *supra* note 1, pt. III, ¶ V(A). The procedure for preparing reports is as follows: First, within 72 hours of their return to their primary work location, the inspectors must submit a preliminary inspection report to the Director General. Second, the Director General will forward this report to the requesting State Party, the inspected State Party and the Executive Council. Third, a draft final report must be

20 days in order to make comments and identify any non-CWC material that it considers confidential.<sup>206</sup> After the Technical Secretariat considers such comments, the final report itself must be submitted to States Parties within thirty days of completing the inspection.<sup>207</sup>

## 6.2 PROBLEMS OF WARRANTLESS CHALLENGE INSPECTIONS.

Warrantless challenge inspections present the most difficult constitutional problem identified in this analysis. Unlike routine inspections, challenge inspections are based on suspicion of a treaty violation.<sup>208</sup> Furthermore, CWC challenge inspections cannot, by definition, be certain and regular, nor does the Draft Convention limit the scope of the inspectors' access. It may be questioned, therefore, whether the congressional legislation implementing CWC inspections could extend the pervasively regulated industries exception to these inspections as readily as to routine inspections.<sup>209</sup> If pervasive regulation is not the answer, then either a licensing scheme or an outright change to the text of the CWC will be necessary.

### 6.2.1 Warrantless Challenge Inspections of Declared Facilities.

The constitutional problems posed by challenge inspections are more difficult to resolve for declared than for undeclared facilities. Because challenge inspections of declared facilities may not be refused under the Draft Convention, a constitutionally valid means of conducting such inspections without warrants must be found. But since challenge inspections of undeclared facilities may be refused, a system of administrative warrants will suffice because refusal by a judge to issue a requested warrant can stop the inspection without violating the CWC.

**6.2.1.1 Recommendations to Pervasively Regulate Declared Facilities.** The strongest basis for compelling declared facilities to submit to challenge inspections without search warrants is to

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submitted to the inspected State Party within 20 days of the completion of the inspection. This step is intended to aid in the identification, by the inspected State Party, of non-CWC related information that should not be circulated due to its confidentiality. Finally, the Technical Secretariat will consider any proposed changes to the draft final report and may adopt them in its discretion and then, within 30 days of the completion of the inspection, submit the final report. Protocol on Inspection Procedures, *supra* note 1, pt. III, ¶ V(B); July 15 WP – Protocol, *supra* note 1, pt. III, ¶ V(B).

206. *Id.* ¶ V(B); July 15 WP – Protocol, *supra* note 1, pt. III, ¶ V(B).

207. *Id.*

208. See July 15 WP – Art. IX, *supra* note 1, art. IX, § 1; Draft Convention, *supra* note 1, app. 1, art. IX.

209. See section 5.3, *supra*. Selection of targets based on suspicion raises a greater danger of arbitrary invasion and harassment than selection of targets pursuant to a routine inspection scheme. *Marshall v. Horn Seed Co.*, 647 F.2d 96 (10th Cir. 1981). See generally Note, *Administrative Agency Searches Since Marshall v. Barlow's Inc.: Probable Cause Requirements for Nonroutine Administrative Searches*, 70 GEO. L.J. 1183 (1982). The Supreme Court in *New York v. Burger* approved that warrantless search scheme in part because "the vehicle dismantler knows that the inspections to which he is subject do not constitute discretionary acts by a government official. . . ." 482 U.S. at 711. Although some lower federal court decisions have blurred the distinction between certain and regular warrantless searches conducted in order to carry out a comprehensive regulatory scheme and those that are based on particularized suspicion of a violation, it is risky to conclude that the warrant exception for pervasively regulated industries will reach challenge inspections. See, e.g., *United States v. Dominguez-Prieto*, 923 F.2d 464, 469 (6th Cir. 1991). Compare *United States v. Shaefer, Michael & Clairton Slag, Inc.*, 637 F.2d 200, 204 (3rd Cir. 1980).

pervasively regulate them. This is less of an issue for facilities possessing Schedule 1 and 2 chemicals because the implementing legislation already would pervasively regulate them for routine inspections;<sup>210</sup> more problematic are Schedule 3 facilities which are not subject to routine inspections under the CWC.

#### Challenge Inspections of Schedule 1 and 2 Facilities.

The same pervasive regulation scheme justifying warrantless routine inspections of Schedule 1 and 2 facilities also could provide a foundation for warrantless challenge inspection of these facilities. This would require clear evidence of congressional intent to stretch the limits of the Fourth Amendment to the fullest extent possible. Although Congress cannot make challenge inspections "certain and regular" as that term has been defined by legal precedent,<sup>211</sup> the implementing *legislation should* explicitly provide that, in combination with the alternative remedies that also should be included in this legislation,<sup>212</sup> warrantless challenge inspections of Schedule 1 and 2 facilities are necessary to fulfilling the United States obligations under the CWC.

Even buttressed by such provisions in the implementing legislation, it would be prudent to limit the discretion of the inspecting officers. Currently, inspectors have "unlimited access" within the "boundaries" of the site of a challenge inspection. As explained in section 5, particular Fourth Amendment problems are presented by the prospect of warrantless searches of commercial documents and of personal property, as well as by biomedical sampling of facility personnel. The CWC negotiating options discussed regarding routine inspections would similarly restrict the discretion of the inspectors in accord with constitutional requirements. Therefore, *the term "boundaries" in the August 6, 1991 Working Paper should be defined broadly to include all limitations on routine inspections, including both physical areas and searchable articles.* This will assure that constitutionally based conceptual boundaries, in addition to property lines, will properly guide challenge inspectors.

#### Challenge Inspections of Schedule 3 Facilities

Challenge inspections of Schedule 3 facilities add an extra level of complexity. Schedule 3 facilities are not subject to routine inspections and, therefore, will not have the reduced expectation of privacy that would attach to Schedule 1 and 2 facilities. In order to maximize the likelihood that a court would reject a Fourth Amendment test of challenge inspections of Schedule 3 facilities, these, too, should be included in the pervasive regulation scheme proposed above for Schedule 1 and 2 facilities, despite the fact that the CWC will not conduct routine inspections of Schedule 3 facilities.<sup>213</sup> The basis of the inspection is the same: to verify the accuracy of declarations of any and all facilities having scheduled chemicals. Thus, the implementing *legislation should* make the same findings for Schedule 3 facilities as for Schedule 1 and 2 facilities, and should make it equally clear that Congress intends to stretch the limits of the Fourth Amendment with respect to the functions of a warrant to the fullest extent possible.

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210. See section 5, *supra*.

211. See note 123, *supra*.

212. See section 8, *infra*.

213. See text at section 5, *supra*.

## License Possession of Scheduled Chemicals

Support for the constitutionality of warrantless challenge inspections of declared facilities would be strengthened by enactment of a federal licensing scheme requiring prior permission for challenge inspections as a condition of obtaining a federal license to possess chemicals listed on Schedule 1, 2 or 3.<sup>214</sup> As explained in section 4.2, the federal government can require its licensees to waive constitutional rights so long as the condition is "rationally related to the benefit conferred" by the license.<sup>215</sup> Since the purpose of making a license conditional on permitting warrantless searches would explicitly be related to the goal of assuring compliance with the CWC, it might be found constitutional if challenged in court, although the outcome is by no means certain.<sup>216</sup>

While a new federal licensing scheme would entail significantly greater government bureaucracy and expense, if policymakers decide that it is worth the likely attendant difficulties, then the implementing *legislation should* require each possessor of Schedule 1, 2 or 3 chemicals to obtain a license to hold them. A condition of that license would explicitly state that every licensee grants CWC inspectors the right to inspect their facilities and records without a search warrant in order to fulfill the licensing scheme's purpose of deterring illicit chemical weapons production.

**6.2.1.2 Recommendation to Make Challenge Inspections of Declared Facilities Refusable.** The difficulties of using pervasive regulation to justify challenge inspections of declared facilities suggest that such a regulatory scheme, despite adding expense for both industry and government, will not eliminate the risk that such inspections will be adjudged unconstitutional. This conclusion may be sufficiently unpalatable that it becomes desirable to consider whether challenge inspections of declared facilities, like those of undeclared facilities, should be refusable under the CWC. If this course is chosen, then *the August 6, 1991 Working Paper should be changed by adding the phrase "1 (with respect to its legal obligations)," after "III.B." on page 2.* The result of this change would be to render challenge inspections of declared facilities subject to the limitation in the July 15 Working Paper that access be provided "taking into account . . . legal obligations . . .,"<sup>217</sup> which would accordingly make challenge inspections of declared facilities refuseable where they would contravene the legal obligations of the Bill

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214. Cf. B. CARNAHAN, *supra* note 38, at 10-11.

215. *United States v. Geophysical Corp. of Alaska*, 732 F.2d 693, 700 (9th Cir. 1983).

216. One commentator explains the problem that such a statutory provision would present to a reviewing court:

Thinkers . . . have suggested that . . . the legitimacy of a government proposal depends upon the degree of relatedness between the condition on a benefit and the reasons why government may withhold the benefit altogether. The more germane a condition to a benefit, the more deferential the review; nongermane conditions, in contrast, are suspect. . . . The opinions of the [Supreme] Court reflect two opposing positions on the significance of germaneness. . . . One position argues that the less germane a condition to the reason for withholding benefits altogether, the more suspiciously it should be treated. The opposing position denies the significance of germaneness; instead, it argues that the greater power to withhold a gratuitous benefit always includes the lesser power to grant it on condition.

Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1457, 1458 (1989) (footnote omitted). Furthermore, "[g]ermaneness theories . . . fail to explain why *germane* burdens on constitutional rights should be regarded as benign." *Id.* at 1476 (emphasis in original).

217. July 15 WP -- Protocol, *supra* note 1, pt. III, ¶ III(B)(1).

of Rights. In addition, the implementing *legislation should* include an administrative search scheme identical to that discussed immediately below in section 6.2.2.

### 6.2.2 Warrantless Challenge Inspections of Undeclared Facilities.

It is also questionable whether even a carefully established scheme of pervasive regulation could justify warrantless challenge inspections of undeclared facilities. The range of facilities that may be inspected is essentially infinite, giving rise to the possibility that those with a high expectation of privacy – even home owners<sup>218</sup> – will be selected for inspection based on suspicions that could amount to arbitrary harassment. Therefore, it must be assumed that a warrant will be required for challenge inspections of undeclared facilities.

**6.2.2.1 Fourth Amendment and Administrative Searches.** The administrative nature of the CWC regulatory scheme justifies an efficient system for obtaining warrants for challenge inspections of undeclared facilities in accordance with the Fourth Amendment. Congress may empower federal agencies to inspect private property to acquire information necessary to their law enforcement responsibilities.<sup>219</sup> Since challenge inspections of these facilities would be conducted "for the purpose of clarifying and resolving any questions concerning compliance with the provisions of the Convention,"<sup>220</sup> they may be authorized by administrative warrants, issued without notice to the subject.<sup>221</sup> A judge could refuse to grant the National Authority's application for an administrative warrant, but such refusal would not breach the CWC since the United States need only permit challenge inspections of undeclared facilities taking into account its legal obligations.

Administrative warrants require a showing of administrative probable cause, which is defined to mean that the public interest in the inspection must outweigh the invasion of privacy that the inspection entails.<sup>222</sup> When presented with a request for an administrative warrant, the magistrate must review whether there is an established inspection policy and whether the contemplated inspection is consistent with that policy.<sup>223</sup> Where inspections "are not programmatic, but are responsive to individual events,

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218. In *Payton v. New York*, 445 U.S. 573 (1980), the Supreme Court declared:

The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home. . . . [T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

*Id.* at 589-90.

219. B. SCHWARTZ, *ADMINISTRATIVE LAW* § 3.1, at 92 (2d ed. 1984).

220. *July 15 WP – Art. IX*, *supra* note 1, art. IX, § 1.

221. *Marshall v. W & W Steel Co.*, 604 F.2d 1322 (10th Cir. 1979).

222. *Burkart Randall Div. of Textron, Inc. v. Marshall*, 625 F.2d 1313, 1319 (7th Cir. 1980).

223. *Marshall v. Barlow's Inc.*, 436 U.S. 307, 320 (1978). See generally W. LAFAYE, *supra* note 77, § 10.1(c), at 611-12.

a more particularized inquiry may be necessary,"<sup>224</sup> supported by "some plausible basis for believing that a violation is likely to be found."<sup>225</sup>

How plausible this suspicion must be depends in part on the purpose of the inspection.<sup>226</sup> Where an administrative inspection is conducted in order to gain evidence of criminal violations, the inspecting agency must show that the purpose of the inspection is more than merely to assess compliance with the regulatory scheme.<sup>227</sup>

Once probable cause for the issuance of an administrative warrant has been established, the issuing court must determine the proper scope of the warrant. This requires evaluation of the gravity of suspicion, the intrusiveness of the inspection, and its necessity to the purpose of the regulatory statute.<sup>228</sup> For example, searches of documents have been upheld where the warrant is tailored to produce only those records directly related to the inspection's purpose.<sup>229</sup>

**6.2.2.2 Recommendation to Authorize Administrative Searches.** The implementing *legislation should* authorize any federal judge or magistrate,<sup>230</sup> upon a showing of administrative probable cause, to issue a warrant empowering the National Authority to conduct an inspection on behalf of the Technical Secretariat in connection with challenge inspections.<sup>231</sup> In order to ensure that warrant requests are heard within the CWC's time frame, the *legislation should* provide that the court shall advance on its docket and expedite to the greatest extent possible the disposition of the request.<sup>232</sup> A warrant should issue only upon an affidavit sworn by an official of the National Authority, establishing

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224. *Michigan v. Tyler*, 436 U.S. 499, 507 (1978); *United States v. Burka*, 700 F. Supp. 825 (E.D. Pa. 1988).

225. *Martin v. International Matex Tank Terminals-Bayonne*, 928 F.2d 614, 624, *citing* *Marshall v. Horn Seed Co., Inc.*, 647 F.2d at 102. *See also* *West Point-Pepperell, Inc. v. Donovan*, 689 F.2d 950, 958 (11th Cir. 1982) (probable cause exists where there is a reasonable belief that a violation has been or is being committed and not upon a desire to harass the target of the inspection). However, mere boilerplate assertions that there are reasonable grounds to be suspicious will not support the issuance of a warrant. *Weyerhaeuser Co. v. Marshall*, 592 F.2d 373 (7th Cir. 1979).

226. *United States v. Roux Laboratories, Inc.*, 456 F. Supp. 973, 977 (M.D. Fla. 1978).

227. *See* Note, *supra* note 209, at 70.

228. *Marshall v. North Am. Car Co.*, 476 F. Supp. 698 (M.D. Pa. 1979).

229. *Marshall v. W & W Steel Co.*, 604 F.2d 1322 (10th Cir. 1979).

230. It is possible that an administrative law judge attached to the National Authority could be empowered to issue administrative warrants. The benefits of such empowerment in terms of quicker decisions by someone with specialized expertise versus concerns as to the independence of such an official should be evaluated in the context of a more detailed inquiry as to the composition and powers of the National Authority.

231. *See* 7 U.S.C. § 136g(b) (empowering duly authorized officers and employees of the U.S. Environmental Protection Agency to obtain and execute warrants upon a showing of reason to believe that the provisions of FIFRA have been violated).

232. *See* 2 U.S.C. § 922(c) (providing for expedited review of challenges to potentially unconstitutional actions undertaken to eliminate federal budget deficits).



the grounds for its issuance. If satisfied that probable cause for the application exists, a judge or magistrate should be required to issue a warrant.

The warrant should restate the grounds for its issuance and authorize the National Authority, accompanied by the Technical Secretariat's inspection team, to search a specific area, premises, building, conveyance, or contents thereof, to install and use monitoring equipment, and to take samples. It should direct that the inspection be conducted during normal business hours. Each such inspection should be commenced and completed with reasonable promptness.

If the subject of a challenge inspection refuses to permit execution of an administrative warrant or impedes the inspector in its execution, the *legislation should* provide that he or she shall be advised that such refusal or action constitutes a violation of law that can lead to arrest, and the inspection shall proceed.

### 6.3 PROBLEMS OF SECURING THE CHALLENGED SITE.

To prevent the escape of contraband from facilities suspected of producing or containing CWC banned chemicals, the Draft Convention contemplates that inspectors will, upon their arrival and for the duration of the inspection, take actions to secure the site. While these actions will be less severe for undeclared facilities than for declared facilities, three constitutional problems are raised at either type of facility. First, any step taken that prevents a person from freely exiting the facility could be considered a seizure of that person in violation of the Fourth Amendment. Second, detention and search of exiting private vehicles may be unconstitutional. Third, monitoring of the facility may exceed the limits of the "plain view" doctrine and thus be an unconstitutional search.

#### 6.3.1 Detentions of Persons within the Inspected Area.

**6.3.1.1 Fourth Amendment and Detentions.** The Protocol on Inspection Procedures authorizes establishment of vehicle checkpoints at the perimeter of a challenged declared facility.<sup>233</sup> The courts have consistently upheld the constitutionality of vehicle checkpoints. For example, inspections for weapons or explosives in vehicles seeking to enter military and other sensitive federal installations are routinely approved as reasonable to meet the need to exclude dangerous material from the restricted area.<sup>234</sup> Also, immigration and sobriety checkpoints are legal where the state's interest outweighs the minimal duration and intensity of the stop.<sup>235</sup>

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233. Protocol on Inspection Procedures, *supra* note 1, pt. III, ¶ II(C)(2). It is important to note that the authority to secure the site does not appear to include authority to inspect persons as they are leaving; only means of transport are included. Theoretically, nothing in the Draft Convention would prevent or delay a person from walking out of a site whose perimeter is secured. However, this may be impractical for many who happen to find themselves within a site that becomes subject to a challenge inspection; hence, this analysis assumes that they are in fact detained to some degree.

234. *United States v. Miles*, 480 F.2d 1217 (9th Cir.), *cert. denied*, 414 U.S. 1008 (1973). However, individuals must have the right to avoid the search by electing not to seek access to the restricted area. In other words, no search should be undertaken without a specific warning that s/he has the option of departing rather than submitting to the search.

235. *Michigan Dept. of State Police v. Sitz*, 110 S. Ct. 2481 (1990).

It is well settled that American law enforcement officers may question anyone.<sup>236</sup> However, if the individual refuses to submit to a search or to answer questions, the Fourth Amendment prohibits police from taking additional steps without "minimal suspicion" of illegal conduct.<sup>237</sup> The critical factors are the duration of the detention and the investigator's diligence.

The Supreme Court in *United States v. Place*<sup>238</sup> ruled that an unreasonably lengthy detention violates the Fourth Amendment, although the Court has explicitly refused to state how long is too long.<sup>239</sup> Fourth Amendment concerns are stronger where the detention not only interferes with possession of the vehicle but also prevents the individual from leaving.<sup>240</sup>

A second important consideration is investigatory diligence.<sup>241</sup> Diligence is characterized by steady, earnest, energetic, and attentive application and effort toward a predetermined end.<sup>242</sup> Where prompt effort and attention would have shortened a long delay, the detention will be deemed unreasonable.<sup>243</sup>

Even if the initial suspicionless detention is reasonable, further detention will be permissible only where reasonable articulable suspicion exists. "Reasonable suspicion" is an objective criterion based upon the experience and training of the official and the suspect's unusual personal characteristics including visible nervousness. It must be based on something more than an unparticularized hunch, but less than that required for probable cause.<sup>244</sup>

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236. *Florida v. Bostick*, 111 S.Ct. 2382 (1991).

237. *United States v. Mendenhall*, 446 U.S. 544 (1980); *Brown v. Texas*, 443 U.S. 47 (1979).

238. 462 U.S. 696 (1982). "The length of the detention of the respondent's luggage alone precludes the conclusion that the seizure was reasonable in the absence of probable cause. . . . [T]he brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion."

239. Authorities may graduate their responses to the demands of any particular situation. *United States v. Sharpe*, 470 U.S. 675 (1985).

240. *United States v. LaFrance*, 879 F.2d 1 (1st Cir. 1989). However, where the person is free to leave, even lengthy detention of his original means of transport is permissible. *State v. Darack*, 312 S.E.2d 202 (N.C.App. 1984) (three-hour detention of airplane upheld because the airplane could be detained without detaining the pilot since he could leave by other means).

241. *United States v. Cooper*, 873 F.2d 269 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 118 (35 minute delay not too long in light of the diligence of police).

242. *United States v. LaFrance*, 879 F.2d 1, 8 (1st Cir. 1989). This should not be confused with a test of how well-prepared the investigatory officials are, *United States v. Alpert*, 816 F.2d 958 (4th Cir. 1987), nor whether there may be less intrusive alternatives, *United States v. Sokolow*, 109 S. Ct. 1581 (1989).

243. *United States v. Dass*, 849 F.2d 414 (9th Cir. 1988).

244. *United States v. Sokolow*, 109 S. Ct. 1581, 1585 (1989).

In *United States v. Taylor*,<sup>245</sup> the court upheld an extended vehicle probe for drugs at a U.S. Border Patrol checkpoint after the vehicle already had been briefly detained without suspicion for immigration-related inquiries. The court decided that the additional detention was reasonable due to the driver's suspicious behavior and the grave public concern with the flow of illicit narcotics. Thus, such stops are reasonable provided that the scope of the additional detention remains confined to a few brief questions, the production of identification, and inspection of the vehicle within the limits of what can be discerned without a search (including the use of special equipment or means of detection such as dogs). Only if these additional nonintrusive procedures give rise to probable cause may the closed interior of a vehicle be completely searched.

Thus, it is constitutional under the Fourth Amendment for CWC inspectors to seal off a declared facility and briefly detain everyone seeking to leave while their vehicles are examined, despite the fact that those persons may have had no prior knowledge that they would be subject to such a detention. However, if the stop results in a lengthy delay, it may cross the line drawn by the Fourth Amendment, especially if the length of the detention results from a lack of diligence on the part of the inspection team. The difficulty with the Draft Convention as written is that it contains no language to take account of these restrictions, with the consequence that permissible procedures under the Draft Convention could cause constitutional conflicts.

**6.3.1.2 Recommendation to Allow Only Brief Detentions.** Since the basic concern that courts have expressed about detentions of people is the time involved, *a new sentence should be added to Section II(C) of Part III of the Protocol on Inspection Procedures requiring that any detentions of persons resulting from measures to secure a site must be brief, not to exceed the duration of the inspection of the means of transport, and that such inspection be performed diligently.* This would have the effect of limiting the length of time one could be prevented from leaving the site to that needed to inspect the vehicle, and would specify the requirement for investigatory diligence. Of course, this would have the effect of compelling the Technical Secretariat to have and devote sufficient resources to each challenge inspection to assure that this requirement could be met.

### **6.3.2 Searches of Means of Transport.**

As indicated above, the authority to inspect means of transport exiting a challenged site varies depending upon whether the facility is declared or undeclared. All vehicles exiting from declared facilities are subject to inspection.<sup>246</sup> However, passenger vehicles exiting undeclared facilities are specifically exempted from search.<sup>247</sup>

**6.3.2.1 Fourth Amendment and Vehicle Searches.** The Supreme Court has long interpreted the Fourth Amendment to distinguish between the need for a warrant to search for contraband concealed in a building and the need for a warrant to search for contraband concealed in a vehicle.<sup>248</sup> According to the Supreme Court's recent decision in *California v. Acevedo*,<sup>249</sup> the police may inspect a private

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245. 934 F.2d 218 (9th Cir. 1991).

246. Protocol on Inspection Procedures, *supra* note 1, pt. III, ¶ II(C)(2).

247. July 15 WP – Protocol, *supra* note 1, pt. III, ¶ II(E)(3).

248. *Carroll v. United States*, 267 U.S. 132, 151 (1925).

249. 111 S.Ct. 1982 (1991).

automobile and the containers within it absent a search warrant where they have probable cause to believe contraband or evidence of a crime is inside. However, the general requirement for probable cause remains.<sup>250</sup> Thus, the provisions of the Draft Convention permitting warrantless inspections of private commercial vehicles without suspicion could violate the Fourth Amendment, unless the exception for pervasively regulated industries applies.

The Draft Convention does not comprehensively govern means of transport, reserving the regulatory scheme for "facilities."<sup>251</sup> The only commercial vehicles that could conceivably be inspected without a warrant as a consequence of regulating "facilities" are those carriers owned or leased by these facilities. The Draft Convention's inspection provisions for commercial means of transport as they exit thus appear to be broader than what the Fourth Amendment allows.

To search commercial vehicles other than those owned or leased by Schedule 1 and 2 facilities, it may be possible to separately regulate transporters of scheduled chemicals as an extension of general safety regulations applicable to all commercial carriers. The recent decision in *United States v. Dominguez-Prieto*<sup>252</sup> is instructive. The court upheld the warrantless inspection of a truck's locked cargo compartment that revealed illegal drugs on the ground that common carriers in the trucking industry are pervasively regulated for safety. "There is a clear need to place restrictions on what commodities may be transported and what type of vehicle may be used to transport those commodities. . . . Imposing a warrant requirement would have frustrated both of these goals."<sup>253</sup> As a result of this safety law, the truck driver had a reduced expectation of privacy.<sup>254</sup>

However, in *United States v. Shaefer, Michael & Clairton Slag, Inc.*,<sup>255</sup> the court held that a scheme of pervasive regulation for one purpose does not justify a warrantless search for another purpose. It disallowed a warrantless truck search that the government tried to justify as incident to a statute prohibiting overweight trucks that damage roads, when the investigators in fact were seeking evidence that the owner was short-weighting the purchasers of its product: "The courts will not countenance pretextual use of a regulatory statute for an investigatory purpose unrelated to the regulatory scheme" asserted to justify the warrantless inspections.<sup>256</sup>

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250. "Probable cause," although defying simple definition, has been characterized as "a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213 (1983).

251. *Draft Convention*, *supra* note 1, app. I, art. VI, §§(5)-(7).

252. 923 F.2d 464 (6th Cir.), *cert. denied*, 111 S. Ct. 2063 (1991).

253. *Id.* at 468.

254. *See id.* at 470. However, the Court's reliance in *Dominguez-Prieto* on the fact that the statute was narrower than that upheld in *Burger* because it required warrantless searches to be based on suspicion, 923 F.2d at 469, suggests that the opinion misapplied the reasoning in *Burger*. A careful reading of *Burger* suggests that the Supreme Court would regard a suspicion-based warrantless search as broader, not narrower, than one pursued according to a schedule embodied in a statute, because suspicion-based searches are discretionary and subject to official abuse that a warrant process is required to check. 482 U.S. at 711. *See United States v. Shaefer, Michael & Clairton Slag, Inc.*, 637 F.2d 200, 204 (3rd Cir. 1980) (distinguishing between warrantless searches of trucks pursuant to a regulatory scheme and those undertaken "for an investigatory purpose").

255. 637 F.2d 200 (3rd Cir. 1980).

256. *Id.* at 204 (citations omitted).

In view of the considerable doubt attendant to requiring warrantless inspections of common carriers as an extension of safety regulation, it may be appropriate to consider justifying inspections on a waiver theory. The regulation of facilities might justify searches of vehicles exiting those facilities if the drivers explicitly agree to allow their vehicles to be searched without warrants by entering in the face of signs conditioning their entry on allowing such searches.<sup>257</sup>

### **6.3.2.2 Recommendations to Maximize Allowable Vehicle Searches.**

#### **Include Declared Facility Vehicles within Pervasive Regulatory Scheme**

The implementing *legislation should* clarify that to the extent that it establishes a scheme of pervasive regulation for scheduled facilities that excepts CWC searches from the Fourth Amendment warrant requirement, commercial vehicles that are owned or leased by those facilities are similarly subject to search.

#### **Extend Transportation Regulation to Scheduled Chemicals**

In order to provide that commercial means of transport at a challenged site may be searched without a warrant, the implementing *legislation should* assert that commercial means of transport that carry Schedule 1, 2 or 3 chemicals are subject to search as an extension of safety regulations applicable to all such carriers. This provision would reduce the reasonable expectations of privacy of this segment of the transportation industry.

#### **Require Declared Facilities to Post Signs Conditioning Entry on Agreement to be Searched**

It may be possible for declared facilities to extract consent to be searched pursuant to a challenge inspection by virtue of entering the site. In order to accomplish this, the implementing *legislation should* require that each facility possessing Schedule 1, 2 or 3 chemicals must post clear and obvious signs stating that entry onto their property signifies that the driver agrees to allow CWC inspections of the vehicle without a warrant. In addition, recognizing the cost and administrative difficulties, the *legislation could* require that guards be posted to specifically inform each entrant of this condition.

#### **Exempt Private Passenger Vehicles from Inspections**

Searches of passenger vehicles will be of highly questionable constitutionality because passenger vehicles are accorded greater Fourth Amendment protection than commercial vehicles, with a stronger showing of probable cause required to justify a search. Since a court might conclude that agreement to be searched by the government at a private facility cannot be implied from entry past a posted checkpoint, it may be necessary to alter the CWC itself to remove the problem. Passenger vehicles exiting undeclared facilities are already immune from search. If the verification benefits of searching passenger vehicles exiting declared facilities are not significant, the simplest option would be to *add to Paragraph II(C)(2) of Part III of the Protocol on Inspection Procedures the language "except private passenger vehicles"*

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257. *United States v. Ellis*, 547 F.2d 863 (5th Cir. 1977); *United States v. Fox*, 407 F. Supp. 857 (W.D. Okla. 1975) (both cases approving warrantless searches of passenger automobiles following entry onto military bases where signs were posted stating that entry gave consent to search). No case was located that ruled whether the Fourth Amendment permits warrantless government searches of private passenger vehicles that entered civilian government property -- much less private property -- in the face of signs stating that entry consented to searches.

after "means of transport," thereby rendering passenger vehicles immune from search regardless of whether they are exiting a declared or an undeclared facility.

### 6.3.3 Perimeter Monitoring.

**6.3.3.1 Fourth Amendment and Perimeter Monitoring.** Monitoring instruments deployed at the perimeter of a facility to sense interior activities may not present a Fourth Amendment problem.<sup>258</sup> First, mechanical surveillance of open areas within a perimeter may not constitute a Fourth Amendment search because they are open to plain view. Second, courts have held that certain minor enhancements of an investigator's ordinary senses such as flashlights or binoculars do not create a search of constitutional dimensions. As long as perimeter monitoring is limited in these ways, no Fourth Amendment problems will arise.

However, perimeter monitoring equipment that greatly enhances ordinary powers of human perception, aimed at private areas (e.g., the interiors of buildings), may be a Fourth Amendment search because the target is not in plain view.<sup>259</sup> The constitutionality of such a technique would be suspect if it employed "some unique sensory device that, for example, could penetrate the walls of buildings and record conversations in . . . plants, offices, or laboratories. . . . Highly sophisticated surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant."<sup>260</sup> Presumably, use of such intrusive perimeter monitoring equipment would trigger the requirement for a search warrant.

The intrusiveness of mechanical devices should be thought of as comprised of two elements: sensitivity and selectivity.<sup>261</sup> Sensitivity is "the ability of the output of a device or system to respond to an input stimulus."<sup>262</sup> Selectivity, in this context, is the ability to receive some signals while rejecting others.<sup>263</sup> Since Supreme Court precedent implies that no reasonable expectation of privacy inheres in evidence of illegal conduct,<sup>264</sup> devices that are designed to selectively detect only evidence of a violation may be constitutionally permissible.

The Draft Convention makes no such distinctions. Its terms simply permit the use at a perimeter of any equipment approved by the Technical Secretariat. The approval process, in turn, does not include a criterion for equipment evaluation that clearly would allow the Technical Secretariat to

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258. On-site monitoring of Schedule 1 and 2 facilities does not merit separate discussion. It is unlikely that such instruments would present any more of a problem in the context of routine inspections than the other features of those searches. Any constitutional deficiencies could be subsumed by pervasive regulation of Schedule 1 and 2 facilities, as discussed in section 5, *supra*.

259. Koplow, *Back to the Future and Up to the Sky: Legal Implications of "Open Skies" Inspection for Arms Control*, 79 CALIF. L. REV. 421, 477-479 (1991).

260. *Dow Chemical Co. v. United States*, 476 U.S. 227, 238 (1986).

261. *Tanzman*, *supra* note 67, at 55-58; *Koplow*, *supra* note 259, at 477-79.

262. MCGRAW-HILL ENCYCLOPEDIA OF SCIENCE AND TECHNOLOGY, *Sensitivity* 272 (6th ed. 1987).

263. *Id.* *Selectivity*, at 243.

264. *Cf. California v. Ciraolo*, 476 U.S. 207 (1986).

withhold approval for perimeter monitoring equipment whose use would be a Fourth Amendment search.<sup>265</sup>

**6.3.3.2 Recommendation to Limit Perimeter Monitoring Equipment.** In order to ensure that monitoring equipment used at the perimeter of a challenged site is not so intrusive as to trigger Fourth Amendment protections, the approval process for such equipment should be strengthened regarding what equipment is excluded. *Additional criteria should be added to Paragraph IV D(2) of Part I of the Protocol on Inspection Procedures permitting the Technical Secretariat to approve only that equipment for perimeter monitoring at challenged sites that is highly selective for evidence of illegal conduct.* In this fashion, the development of selective perimeter monitoring instruments that avoid invading reasonable expectations of privacy will be encouraged.

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265. Protocol on Inspection Procedures, *supra* note 1, pt. IV, ¶ D(2).





## SECTION 7

### PROBLEMS OF ENFORCEMENT COMMON TO ALL INSPECTIONS OF PRIVATE FACILITIES

The CWC inspection scheme poses certain constitutional problems common to both routine and challenge inspections. Both the Fourth and Fifth Amendments limit how evidence from inspections is obtained, and whether that evidence can be used in subsequent legal proceedings. These limitations may bring CWC compliance efforts into apparent conflict with protection of individual liberties unless explicit steps are taken to reconcile both interests.

#### 7.1 CONTROLLING PROCUREMENT OF EVIDENCE.

CWC verification requires that information be obtained at private facilities, even from recalcitrant witnesses.<sup>266</sup> No constitutional issues are raised by ordinary law enforcement investigations undertaken by a properly authorized official.<sup>267</sup> However, the CWC requires that the National Authority assist the International Organization to obtain relevant facts which raises potential questions. First, how may the conduct of inspections be authorized such that inspectors have sufficient delegated power to fulfill the CWC verification obligations? Second, how may particular sensitive investigation techniques be controlled? In particular, the possibility that inspections will entail biomedical testing raises unique constitutional questions which both the CWC and Congress should address.

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266. "Inspectors shall have the right to interview any facility personnel. . . ." Protocol on Inspection Procedures, *supra* note 1, pt. I, ¶ VI(D)(2).

A related issue concerns requests to disclose classified information during interviews of persons possessing security clearances. Objections to such requests do not raise constitutional considerations, but the Draft Convention is ambiguous as to the implications of objections for treaty compliance. The CWC explicitly allows objections to questions if they "are deemed not relevant to the inspection," providing only that the "the inspection team may note any refusal to permit interviews or to allow questions to be answered and any explanations given, in that part of the Inspection Report that deals with the cooperation of the Inspected State Party." Protocol on Inspection Procedures, *supra* note 1, pt. I, ¶ VI(D) (2).

At the same time, State Parties may "take such measures as they deem necessary to protect" confidential information. *Draft Convention, supra* note 1, app. I, Annex on the Protection of Confidential Information, ¶ C(1). It is unclear whether this provision obligates the State Party to entrust classified information to the Technical Secretariat. Compare *id. with id.* ¶ A(2)(a)(i). Furthermore, assuming that the Annex permits classified information to be withheld from disclosure to the inspectors, the Annex protects "equipment, documentation or areas," *id.* ¶ C(1), but does not specifically include oral testimony. It is ambiguous, therefore, whether the United States could invoke this text to prohibit answers during interviews. Even if classified answers may be withheld under this Annex, the State Party seeking to protect confidential information still must "comply and demonstrate compliance with their obligations arising from the provisions of this Convention." *Id.* Thus, answers may not be refused where the State Party cannot otherwise show its obedience to the CWC.

267. Law enforcement officers may question anyone so long as the individual is not coerced without due process of law. *United States v. Mendenhall*, 446 U.S. 544 (1980). The Supreme Court recently expanded the concept of consent in the context of an interrogation in *Florida v. Bostick*, 111 S. Ct. 2382 (1991), upholding the right of police to board buses and, without reason to suspect any particular passenger, stand in the aisle to question riders: "In such a situation, the appropriate inquiry is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." *Id.* at 2387.

### 7.1.1 Subpoena Power.

Subpoenas may direct a person either to appear and testify (*subpoena ad testificandum*) or to produce particular documents or records (*subpoena duces tecum*). Usually, subpoenas are not an independent process and may issue only in connection with a pending action or procedure.<sup>268</sup> The power to issue subpoenas is not part of an agency's inherent authority, but is the result of statutory delegation from Congress. If properly authorized,<sup>269</sup> an administrator may institute an investigation and may issue an administrative subpoena without first obtaining a warrant.<sup>270</sup>

Administrative subpoenas are not ordinarily backed by contempt power. While most individuals voluntarily comply with administrative subpoenas, in the event of noncompliance, the agency must seek judicial aid in the form of a court order.<sup>271</sup> If this court order is not obeyed, then the individual will be subject to punishment for contempt. The only other means to enforce a subpoena is to provide criminal penalties (these may be included in the statute and take the form of a fine or imprisonment) for failure to comply with a subpoena.<sup>272</sup>

A party wishing to challenge a subpoena in court would do so by filing a motion to quash. Any such challenge to an administrative subpoena by a private party must show that the evidence sought is "plainly incompetent or irrelevant to any lawful purpose" of the administrative or regulatory agency.<sup>273</sup> However, the administrator's reasonable belief that the defendant and the subject matter are covered by the statute would be sufficient to defeat such a motion.<sup>274</sup>

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268. 97 C.J.S. *Witnesses* § 20(a), at 370 (1957 & Supp. 1991).

269. The Supreme Court in *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946), developed guidelines to determine an administrative subpoena's reasonableness under the Fourth Amendment. First, the investigation must be for a lawfully authorized purpose. Based on this standard, subpoenas can issue even though charges or allegations are not pending. Second, the documents sought need merely be relevant to the inquiry. Needless to say, this minimal showing does not approach the criminal, or even administrative, probable cause standard, and indeed, probable cause to believe that a violation has been committed is not necessary. See K. DAVIS, *ADMINISTRATIVE LAW TEXT* 65-66 (1978). Third, a subpoena must specifically name the documents to be produced and must not be excessive for the purposes, of the inquiry. The result of this requirement is that the subject of the subpoena must, in good faith, be aware of what he is required to produce, and the subpoena must not be so broad that compliance with it would be unduly burdensome. See W. LAFAYE, *supra* note 77, § 4.13(d), at 374. Courts will not sanction "fishing expeditions," *United States v. Morton Salt*, 338 U.S. 632, 642 (1950), and the documents sought must be reasonably relevant to the matter in issue, *Detweiler Bros. v. Walling*, 157 F.2d 841, 843 (9th Cir. 1946), *cert. denied*, 330 U.S. 819 (1947). If these guidelines are met, a district court is obligated to enforce a subpoena that is relevant to the administrative agency's lawful purpose.

270. *Donovan v. Lone Steer, Inc.*, 464 U.S. 408 (1984).

271. *Interstate Commerce Comm'n v. Brimson*, 154 U.S. 447, 485 (1894) (administrative agency cannot enforce its own orders).

272. See 15 U.S.C. § 78u(c) (Securities and Exchange Act provisions under which individuals who refuse to comply with an administrative subpoena shall be subject to fine or imprisonment).

273. *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 508-509 (1943).

274. *Id.* The rationale supporting this rule is that to consider these jurisdictional questions in a subpoena proceeding would unduly hamper and delay administrative investigations. See B. SCHWARTZ, *supra* note 219, § 3.12, at 118-19.

In order to facilitate effective information gathering and inspections for purposes of compliance with the CWC, the implementing *legislation should* vest in the National Authority the power to issue subpoenas.<sup>275</sup> Similar authority is granted to the U.S. Environmental Protection Agency under the Toxic Substances Control Act.<sup>276</sup> Without the ability to issue subpoenas, the National Authority will be limited to obtaining only information that it can gain by consent.

#### 7.1.2 Special Procedures for Biomedical Sampling.

Human biomedical sampling during the course of on-site inspections is not prohibited by the Draft Convention.<sup>277</sup> Prudence dictates that this analysis assume the broadest sampling authority, i.e., that on-site inspections may include taking human biomedical samples.

**7.1.2.1 Constitutional Implications of Biomedical Sampling.** Sampling from people, including blood, breath or urine samples, presents particularly difficult issues. Within the meaning of the Fourth Amendment, such sampling plainly constitutes a search of "persons" because of both of the obvious intrusiveness of the sampling procedure and what that analysis may reveal.<sup>278</sup> In a series of

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275. Assuming that the Annex on Confidential Information permits a State Party to prohibit persons from divulging classified information when interviewed by inspectors, the implementing legislation should limit the scope of such subpoenas to unclassified information. Thus, no subpoena could compel a person to disclose classified information during a CWC inspection interview. See note 266, *supra*. In the unlikely event that the issue ever reaches an American court, the federal government could invoke the state secrets privilege to require silence. See generally Classified Information Procedures Act, 18 U.S.C. app. §§ 1-15; *United States v. Reynolds*, 345 U.S. 1 (1953); *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395 (D.C. Cir. 1984); *Halkin v. Helms*, 690 F.2d 977 (D.C. Cir. 1982).

276. 15 U.S.C. § 2610(c). "[T]he Administrator may by subpoena require the attendance and testimony of witnesses and the production of reports, papers, documents, answers to questions, and other information that the Administrator deems necessary."

277. The Protocol on Inspection Procedures is ambiguous regarding whether human tissue or fluid samples may be taken during on-site inspections. Permitted sampling procedures explicitly include "biomedical samples from human . . . sources," only in cases of alleged chemical weapons use. The Protocol includes no stated limits on who or what can be sampled during routine inspections; the July 15 Working Paper limits sampling during challenge inspections of undeclared facilities to "air, soil, wipe or effluent samples from the inspection site," *July 15 WP -- Protocol*, *supra* note 1; nor is there any indication of whether biomedical sampling will be permitted during challenge inspections of declared facilities, *August 6 WP*, *supra* note 1. Thus, it could be argued that because permission to take human biomedical samples is only allowed where chemical weapons use is alleged, it would be allowed in no other circumstances. On the other hand, it could be contended with similar force that the Protocol's limitation implies that samples taken during other inspections could include human biomedical samples. Compare Protocol on Inspection Procedures, *supra* note 1, pt. I, ¶ VI(E) with *id.* pt. III, ¶ III(E) and *id.* pt. IV, ¶ III(B).

278. If inspectors request biomedical samples to carry out their inspection, it is unclear whether an American court would grant a search warrant ordering such procedures unless the person from whom samples are sought is also suspected of violating domestic criminal law. No case has been located in which the government even sought, much less obtained, court approval for biomedical sampling of somebody who was not either a criminal defendant or an alleged victim. Where the subject of a proposed biomedical sample is a defendant in a criminal proceeding, the Supreme Court has compelled it. *Schmerber v. California*, 384 U.S. 757 (1966) (blood test for drunk driving following accident). However, the Court has cautioned that intrusions into the body may be unreasonable where the procedure threatens the health or safety of the subject or offends the subject's "dignitary interests." *Winston v. Lee*, 470 U.S. 753, 760-61 (1984). Therefore, if the United States were to present evidence to a court establishing probable cause that a biomedical sample would uncover evidence of a violation of the CWC penal

recent decisions, the Supreme Court has upheld urine and blood sampling where it is carried out under a specific plan and is applied either randomly or routinely to government employees, or to private employees who occupy particularly sensitive positions and who are tested pursuant to government regulations.<sup>279</sup> Absent some individualized reasonable suspicion that would justify a warrant, the Fourth Amendment intrusion must serve special governmental needs, beyond the normal need for law enforcement, that outweigh the individual's privacy expectations.<sup>280</sup>

The courts have defined three categories of "special governmental needs." The first, and by far the largest, concerns safety sensitive jobs involving "duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences."<sup>281</sup> Interestingly, two courts have split on the question of testing civilian employees at chemical weapons facilities.<sup>282</sup> The second

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legislation, and if the sampling process passes the test in *Winston* (i.e., the procedure is relatively unintrusive), then a warrant would likely issue -- under the authority of domestic law rather than the CWC. It is conceivable, though unprecedented, that a court also would uphold an administrative warrant requiring a biomedical sample (i.e., based on suspicion of the site, not of any person thereon), provided that the sampling process was very unintrusive. It is questionable whether urinalysis would ever be approved on this basis because of its intrusiveness. See *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 109 S. Ct. 1402, 1413 (1989) (urinalysis invades privacy). See generally Comment, *A Fourth Amendment Approach to Compulsory Physical Examinations of Sex Offense Victims*, 57 U. CHI. L. REV. 873 (1990).

279. In *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S. Ct. 1384 (1989), the Supreme Court ruled that no warrant was necessary prior to testing Customs Service employees because there would be no specific facts for a neutral magistrate to evaluate -- testing all employees was automatic upon promotion or transfer to positions: (1) having a direct involvement with interdiction or (2) requiring the carrying of a firearm. Furthermore, a warrant requirement would "divert valuable agency resources from the Service's primary mission," and would provide little protection because Service employees are aware of the circumstances allowing testing. See also *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 109 S. Ct. 1402 (1989); (upholding drug testing of U.S. Customs Service employees); *Ruston v. Nebraska Pub. Power Dist.*, 844 F.2d 562 (8th Cir. 1988) (permitting drug testing of workers at nuclear power facilities).

280. *International Bhd. of Teamsters v. Department of Transp.*, 1991 U.S. App. LEXIS 7352 (9th Cir. 1991).

281. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 109 S. Ct. 1402, 1419 (1989). See also *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S. Ct. 1384, 1393 (1989) (customs service employees directly involved in the interdiction of illegal drugs or those required to carry a firearm may be subject to drug testing because: "the public should not bear the risk that employees who may suffer from impaired perception and judgment will be promoted to positions where they may need to employ deadly force."); *International Bd. of Teamsters v. Department of Transp.*, 1991 U.S. App. LEXIS 7352 (9th Cir. 1991); *Bluestein v. Skinner*, 908 F.2d 451 (9th Cir. 1990) (airline industry personnel); *IBEW, Local 1245 v. Skinner*, 913 F.2d 1454 (9th Cir. 1990) (employees engaged in hazardous liquid pipeline operations); *Penny v. Kennedy*, 915 F.2d 1065 (6th Cir. 1990) (firefighters and police officers); *Taylor v. O'Grady*, 888 F.2d 1189 (7th Cir. 1989) (correctional officers in regular contact with inmates); *American Fed'n of Gov't Employees v. Skinner*, 885 F.2d 884 (D.C. Cir. 1989), cert. denied, 110 S. Ct. 1960 (1990) (various transportation workers); *National Treasury Employees Union v. Yeutter*, 918 F.2d 968 (D.C. Cir. 1990) (motor vehicle operators employed by the Dept. of Agriculture); *National Fed'n of Fed. Employees v. Cheney*, 884 F.2d 603 (D.C. Cir. 1989) (civilian employees of the United States military who occupy positions in aviation, police and as guards).

282. The D.C. Court of Appeals in *National Fed'n of Fed. Employees v. Cheney*, 884 F.2d 603, 611 (D.C. Cir. 1989), held that absent particularized proof that secretaries, engineering technicians, research biologists, and animal caretakers have access to highly dangerous chemical material and sensitive information, random drug testing was unreasonable because there was not a clear, direct connection between the duties of a lab technician or other

category of "special governmental needs" includes protection of national security and sensitive information. Employees with a security clearance in positions of handling sensitive information can be required to submit to a urine test<sup>285</sup> because the government's interest in protecting these materials outweighs the employees' privacy interest.<sup>284</sup> The third and least defined category of "special governmental needs" is its interest in ensuring the integrity of its work force so as to maintain public confidence and trust; the problem here is determining whether that interest is sufficiently compelling to justify a search.<sup>283</sup>

Biomedical testing of employees at scheduled facilities would not neatly fit into any of the three recognized special governmental needs that have heretofore supported random testing,<sup>286</sup> but could be upheld on the basis of national security due to the judiciary's recent trend toward deferring to national security interests.<sup>287</sup> Nevertheless, there must be a connection between the objectives of CWC verification and the detection of biochemical indicators that limits who may be subject to such testing and what types of tests may be conducted. The only rational basis for selection is the likelihood of exposure, which may be defined as physical proximity to the facility's operations.

Assuming that "special governmental needs" would justify human biomedical sampling during routine inspections, the intrusiveness of these searches must still be balanced against those needs. Accordingly, the implementing *legislation could* authorize the National Authority to assist in biomedical testing at inspected facilities. While it is important to guarantee the accuracy of the sampling, the

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employee and the nature of the feared harm. The Fourth Circuit in *Thomson v. Marsh*, 884 F.2d 113, 115 (4th Cir. 1989), by contrast, held that civilian research biochemists and pipefitters at the Aberdeen Proving Grounds, having access to areas in which experiments are performed with highly lethal chemical warfare agents, may be tested because the government's interest in the safety of the workplace at Aberdeen is compelling: "if an employee working with the agent 'CK' released merely a small amount of the chemical in a large room, he would kill everyone within a few feet and seriously injure all those within a few yards."

283. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S. Ct. 1384, 1397 (1989).

284. *Hartness v. Bush*, 919 F.2d 170, 172-73 (D.C. Cir. 1990), *cert. denied*, 1991 U.S. LEXIS 4033 (1991). However, this category does not include all employees with access to any information which is confidential or closed to public view. *Harmon v. Thornburgh*, 878 F.2d 484, 492 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 865 (1990). A wide range of government employees -- including clerks, typists or messengers -- potentially have access to confidential information, but this does not distinguish them from many workers in the private sector who are obligated to maintain confidentiality.

285. In two recent decisions involving U.S. Department of Justice attorneys, the same circuit distinguished between drug testing of all prosecutors for whom an insufficient connection was established between the nature of the employee's duty and the feared violation, *Harmon v. Thornburgh*, 878 F.2d 484, 490 (D.C. Cir. 1989) (since not all federal prosecutors enforce narcotics laws, there is an insufficient link between their duties and the fear that they would undermine enforcement with their own drug use); and drug testing of new applicants who have a reduced expectation of privacy and whom the government has not had an opportunity to observe in the workplace, *Willner v. Thornburgh*, 928 F.2d 1185 (D.C. Cir. 1991).

286. *Thomson v. Marsh* 884 F.2d 113 (4th Cir. 1989). *But see* *National Fed'n of Fed. Employees v. Cheney*, 884 F.2d 603 (D.C. Cir. 1989).

287. *See* Kellman, *Judicial Abdication of Military Tort Accountability: But Who Is to Guard the Guards Themselves?*, 1989 DUKE L.J. 1597 (1990) (discussing recent Supreme Court decisions deferring to national security concerns).

*legislation should protect employee privacy.*<sup>288</sup> Also relevant is whether the collection process occurs in a medical environment, supervised by trained personnel unrelated to the employer, in a manner that simulates an accepted part of a typical physical examination.<sup>289</sup> A third factor is whether the tested employee has advance notice of the procedure, which reduces the unsettling effect of unexpected intrusions.<sup>290</sup> Fourth, and perhaps most important, is whether the test results will be kept confidential and will not be used in a criminal prosecution without the employee's consent – a prevailing theme in this new and controversial area of litigation is that courts are more likely to uphold government biomedical sampling programs that exclude the results from later use as evidence against the test subject.<sup>291</sup>

In view of the incompleteness of the Draft Convention and the uncertain value of biomedical sampling, inclusion of provisions to protect employee privacy in the implementing legislation without corresponding provisions in the CWC itself runs the risk that the scope of the inspectors authority will exceed the bounds of the legislation's protections. Therefore, if biomedical sampling is seriously contemplated as an inspection technique, the CWC should include specific references to how and when it may be used.

#### **7.1.2.2 Recommendations on Biomedical Sampling.**

##### **Prohibit Compulsory Human Biomedical Sampling**

One option that obviates the constitutional uncertainty of human biomedical sampling under the Draft Convention is simply to amend Paragraph VI(E)(1) of Part I of the Protocol on Inspection Procedures to explicitly prohibit compulsory biomedical sampling. Such a clause would read: *Representatives of the inspected State Party or of the inspected facility shall take samples at the request of the inspection team in the presence of inspectors. Under no circumstances shall biomedical samples be compelled by the inspection team.* This would be a particularly desirable option if the technical value of such sampling is unproven.

##### **Limit Biomedical Sampling Based on Physical Proximity**

If human biomedical sampling must remain an option during on-site inspections, it should be limited by the objectives it is meant to achieve. The only rational connection between the selection of persons subject to testing and the information sought from such tests is physical proximity to the chemicals that may indicate activities in violation of the CWC. Accordingly, Paragraph VI(E)(1) of Part I of the Protocol on Inspection Procedures should specify that *biomedical samples shall only be taken from personnel whose physical proximity to chemical processes makes the presence of biochemical indicators likely.* As a result, only people within a specified distance of plant operations may be subject to testing.

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288. For example, testing may be suspect if performed under the direct observation of a monitor which, while tending to ensure the integrity of the sample, constitutes a greater intrusion into the employee's privacy. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 109 S. Ct. 1402, 1418 (1989).

289. *National Treasury Employees Union v. Yeutter*, 918 F.2d 968, 975-76 (D.C. Cir. 1990).

290. *Willner v. Thornburgh*, 928 F.2d 1185, 1189 (D.C. Cir. 1991).

291. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S. Ct. 1384, 1390 (1989); *Thomson v. Marsh*, 884 F.2d 113 (4th Cir. 1989). This will also reduce a subject's incentive to resist a biomedical sample requested by the Technical Secretariat.

## Reduce Intrusiveness of Human Biomedical Sampling Procedures

If human biomedical sampling must remain an option during on-site inspections, then Paragraph VI(E)(1) of Part I of the Protocol on Inspection Procedures should be amended to reduce the intrusiveness of sampling procedures. This change would provide: (1) *the employees of such facilities should be given advance notice of the testing*; (2) *samples should be taken only pursuant to procedures that respect and protect the employee's privacy in a manner that simulates a medical examination*; and (3) *the results of the test should be kept strictly confidential and precluded from use in law enforcement proceedings or employment actions*.

### **7.2 LIMITING SUBSEQUENT USE OF EVIDENCE IN PENAL PROCEEDINGS.**

The CWC's comprehensive verification scheme raises the possibility of discovering evidence of activities that are illegal under domestic penal legislation enacted pursuant to the CWC.<sup>292</sup> This means that an activity that violates the CWC could become a crime under federal law. Article VII of the CWC is unclear as to what activities are prohibited and therefore subject to penal legislation. One possible interpretation is that prohibited activities include only violations of Article I provisions. However, another possible interpretation would add refusals to cooperate with inspections to the set of prohibited activities. Although the details of such legislation would be within the discretion of each State Party, this provision adds the threat of individual criminal prosecution to a treaty whose central purpose is to deter States' non-compliance by requiring extensive disclosure. As the range of criminalized activities expands, the potential for constitutional conflict increases.

Both the Fourth and Fifth Amendments are implicated by the possibility that evidence obtained during a CWC inspection will be used in prosecutions under domestic laws not specifically related to chemical weapons control.<sup>293</sup> Because United States officials presumably will accompany inspectors at all times and will receive their reports, evidence of wrongdoing could come into the possession of American law enforcement officials who might try to use it in subsequent criminal prosecutions. Those who resist a search might seek to enjoin the inspection; those who become defendants would request that evidence gained from these searches be excluded because its admission would violate the Fourth Amendment. The Fifth Amendment right against self-incrimination may also be implicated by the possibility that CWC inspections will require persons to testify about illegal activities, which may be used as evidence in subsequent prosecutions even for violations irrelevant to the CWC itself.

Contemporary court decisions suggest that this rapidly changing area of law is moving toward allowing prosecutors to use evidence gathered without a search warrant supported by probable cause.

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292. The CWC requires each State Party "to enact penal legislation" that would outlaw prohibited conduct by persons within its jurisdiction. *Draft Convention*, *supra* note 1, app. I, art. VII, § 1(c). The Constitution does not impede Congress from delegating to the National Authority the task of levying and adjudicating civil fines, *see* *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442 (1977), nor from making violation of the CWC a crime. Civil penalties for failure to register or comply with reporting requirements and criminal penalties for fraud or illegal production are common to schemes of pervasive regulation. *See, e.g.*, the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 1361. Generally, civil penalties may be assessed only after notice and opportunity for a hearing; criminal penalties may be imposed by a court only after conviction in a trial with appropriate constitutional safeguards. *See* B. SCHWARTZ, *supra* note 219, § 2.25, at 80-81 (2d ed. 1984).

293. For example, evidence of environmental violations or drug possession might be discovered during a thorough CWC inspection.

Until recently, the courts sternly resisted the deliberate use by the government of an administrative scheme to search and gather evidence for a criminal prosecution. Such use was thought to circumvent the high standard of probable cause needed for a warrant by labelling the search an administrative inspection.<sup>294</sup> But more recent decisions have allowed the use of information obtained through an administrative inspection in a subsequent law enforcement proceeding that is directly related to the purpose of the regulatory scheme. These courts reason that the "plain view" rule allows the use of any incriminating material to enforce the regulatory objectives because the inspectors lawfully gained access to the evidence.<sup>295</sup> Whether this logic would extend to the use of information in an unrelated or tangential proceeding is not clear. While these possibilities would not necessarily undermine CWC enforcement nor threaten its constitutionality, development of procedures to protect against self-incrimination may result in judicial tolerance of more intrusive inspections. The resolution of these problems lies in limiting the permissible use of information in legal proceedings.

#### **7.2.1 Recommendations to Prohibit Use of Inspection Information.**

The CWC's requirement for penal legislation may carry the seeds of future Fourth and Fifth Amendment problems. No recent decision has struck down an inspection on the grounds that evidence gathered in a less threatening administrative context might actually be introduced in a criminal proceeding, but numerous court opinions have indicated that a scheme banning prosecutorial use of such evidence will likely result in judicial tolerance of more intrusive inspections. For example, most decisions upholding schemes for human biomedical testing have focused in part on the fact that the test results will not be used for law enforcement purposes.<sup>296</sup> Therefore, while the operation of penal legislation will not necessarily contradict the Fourth Amendment, it may strengthen claims that the inspection scheme is unconstitutionally intrusive.

**7.2.1.1 Delete Penal Statute Requirement.** The obligation to enact penal legislation undeniably complicates the legality of intrusive inspections under the Fourth Amendment. *The simplest option, therefore, is to delete Paragraph 1(c) of Article VII from the Draft Convention.* Whatever other costs and benefits the deletion of this obligation would have, it would support the Fourth Amendment legality of intrusive inspections.

**7.2.1.2 Define Prohibited Activities.** If domestic enactment of a penal statute remains a CWC requirement, its provisions could yet be limited to activities that are prohibited by Article I. This could be accomplished by rewording Paragraph 1(a) of Article VII to *prohibit . . . any activity that a State Party to this Convention is prohibited from undertaking by Article I of this Convention.* Accordingly, activities that do not meet the CWC's inspection obligations would not, by themselves, constitute illegal actions covered by the required domestic penal legislation. Since evidence of noncompliance with inspection scheme requirements could not lead to a prosecution, constitutional scrutiny of its searches would be more deferential to the CWC.

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294. See *New York v. Burger*, 482 U.S. 691, 723-29 (1987) (Brennan, J., dissenting).

295. In both *United States v. Nechy*, 827 F.2d 1161 (7th Cir. 1987), and *United States v. Jamieson-McKames Pharm.*, 651 F.2d 532 (8th Cir. 1981), the courts permitted the use of inspected information in a subsequent drug enforcement proceeding since the purpose of the regulatory regime was designed to detect illegal production and sale of drugs.

296. See section 7.1.2, *supra*.



**7.2.1.3 Consent to Foreswear or Limit Use of Inspection Information.** If domestic enactment of a penal statute remains a CWC requirement, then the facility agreements executed between the Organization and the United States could explicitly enable the federal government to foreswear the law enforcement use of evidence obtained through inspections. Model Facility Agreements<sup>297</sup> should be altered to include a new section: *Domestic Penal Legislation – State Parties shall have the right to foreswear the use of evidence obtained during on-site inspections in subsequent penal proceedings.* Such a provision would not only remedy potential conflicts with the Fourth Amendment, but would also demonstrate the strong support of the United States for the CWC's primary objective – detection of noncompliance.

An intermediate option would be a provision to limit the use of information obtained through inspections only for prosecutions related to the production or trade of chemical weapons. For example, such a provision would exclude evidence of environmental law violations that might be discovered during inspection activities. In order to accomplish this, the Model Facility Agreements should be altered to include a new section: *Domestic Penal Enforcement: State Parties shall have the right to foreswear the use of evidence obtained during on-site inspections in subsequent penal proceedings that are not directly related to the illegal production or trade of chemical weapons.* This would further deter illegal weapons activities, while minimizing conflicts with the Fourth Amendment.

#### **7.2.2 Recommendation to Authorize Use Immunity.**

If the CWC implementing legislation is to provide for subpoenas to enforce the treaty obligation to permit interviews of Schedule 1 or 2 facility personnel, then the *legislation should* also provide that the information so obtained will not be used to prosecute those who are thus forced to testify. The only way to prevent a refusal to answer in this situation (which presumably would breach the CWC) is to grant that person legal immunity from use of the information that is divulged. Use immunity prohibits "use" of the information learned during compelled testimony against the witness who gave it.<sup>298</sup> Once immunity is granted, the witness would be unable to remain silent without risking contempt or other punishment.<sup>299</sup> Authority to grant use immunity probably would accomplish the purposes of the CWC, and will likely result in judicial tolerance of more intrusive inspections. Such a provision would have the further advantage of mooted the major objection to broad subpoenas: that they may compel self-incrimination.<sup>300</sup>

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297. *Draft Convention*, *supra* note 1, app. II, Models for Agreements.

298. Y. KAMISAR, W. LAFAYE & J. ISRAEL, *supra* note 39, at 684. In contrast, the broader transactional immunity prohibits prosecution of the witness for any crime about which he or she was forced to answer questions. Since the trend of court opinions has been to uphold use immunity as sufficient to protect Fifth Amendment rights, there would seem to be no reason to grant the broader transactional immunity. *See id.* at 685-86.

299. *Id.* at 685.

300. *Boyd v. United States*, 116 U.S. 616, 630 (1886) ("any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or forfeit his goods" violates the Fourth and Fifth Amendments).

Authority to grant use immunity pursuant to CWC inspections could be integrated into existing federal law.<sup>301</sup> It should provide that where a person who has been subpoenaed pursuant to a CWC inspection invokes the Fifth Amendment right against self-incrimination, the National Authority may, on behalf of the Technical Secretariat, ask the Attorney General of the United States to grant immunity from prosecution.<sup>302</sup> The implementing legislation should specify that such use immunity applies both to prosecutions for alleged violation of the CWC and alleged violations of other, unrelated state, federal, and international offenses.

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301. See 18 U.S.C. §§ 6001-05 (authorizing federal courts and agencies to issue orders requiring a witness to testify or provide information provided that: (1) witness has refused to testify on the basis of self-incrimination; and (2) the evidence will not be used in a subsequent criminal action).

302. In particular, the definition of a "proceeding before an agency of the United States," 18 U.S.C. § 6001 (3), should be broadened. Assuming that the National Authority is an "agency of the United States" under § 6001(1), it may be uncertain whether a CWC inspection initiated by the International Organization would qualify as a "proceeding" by a United States agency. In order to assure that the National Authority is empowered to grant immunity for testimony given to the International Organization, language could be added to § 6001(3) specifying that CWC inspections by the International Organization are "proceedings" for the purpose of granting use immunity.

## SECTION 8

### REMEDIES

The possibility that inspections may injure private citizens means that victims must have a remedy that compensates them for their loss. First, a person subject to either a routine or challenge inspection may seek legal means to resist a CWC inspection, arguing that the inspection could violate Fourth Amendment rights leading to humiliation, distress, injury to reputation or other consequences of loss of privacy. While implementation of the previously discussed options may render such resistance without merit, the possibility remains that either a court will be asked to stop CWC inspections or that Americans will claim that a compulsory inspection violates their rights. Second, consideration must be given to the possibility that CWC inspections will lead to the revelation of trade secrets, thereby triggering the right to compensation under the takings clause of the Fifth Amendment. As to each of these problems, domestic implementing legislation for the CWC can both preserve constitutional rights of inspected Americans and empower the National Authority to carry out its compliance obligations.

#### 8.1 REMEDIES FOR UNREASONABLE SEARCHES.

##### 8.1.1 Ban on Injunctions.

The implementing *legislation should* include a ban on court injunctions against routine or challenge inspections. An injunction<sup>303</sup> is the standard method of prohibiting an unconstitutional search where other legal remedies, notably monetary damages after the fact, would be inadequate to compensate for the resulting harm.<sup>304</sup> However, if an American court were to enjoin an inspection by the International Organization, the United States might be perceived as having violated its obligation to demonstrate compliance with the CWC.<sup>305</sup>

While judicial interference with the CWC is unlikely, a legislative ban on injunctions against CWC inspections would eliminate this risk. Instead, the subject of the inspection should be permitted to seek monetary damages to compensate for any losses that actually result.

The Supreme Court has upheld statutory bans on injunctions. In *Yakus v. United States*,<sup>306</sup> the Court explained that Congress can override the traditional grounds on which injunctions are granted:

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303. An injunction is defined as:

"[a] court order prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury. Generally, it is a preventive and protective remedy, aimed at future acts and is not intended to redress past wrongs."

BLACK'S LAW DICTIONARY 784 (6th ed. 1990).

304. See *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1981); *Bell v. Hood*, 327 U.S. 768 (1946); *Megapulse, Inc. v. Lewis*, 672 F.2d 959 (D.C. Cir. 1982) (granting injunction against disclosure by U.S. Coast Guard of trade secrets that had been disclosed by the private plaintiff pursuant to a government contract).

305. *Tanzman & Kellman*, *supra* note 106, at 22.

306. 321 U.S. 414 (1944).

[W]here an injunction is asked which will adversely affect a public interest . . . the court may in the public interest withhold relief until a final determination of the rights of the parties, even though the postponement may be burdensome to the plaintiff . . . . The legislative determination of what would otherwise be a rule of judicial discretion is not a denial of due process or a usurpation of judicial functions. . . . Our decisions leave no doubt that when justified by compelling public interest the legislature may authorize summary action subject to later judicial review of its validity.<sup>307</sup>

A legislative ban on injunctions has strong statutory precedent where Congress has forbidden judicial interference in processes where there is a significant public interest in uninterrupted continuance. The Anti-Injunction Act,<sup>308</sup> for example, is not unconstitutional<sup>309</sup> even though it bars injunctions against the collection of any federal tax, however wrongly imposed.<sup>310</sup> Similarly, the Norris-LaGuardia Act<sup>311</sup> prohibits injunctions against ongoing labor disputes.

It is essential that the statute be unambiguously worded.<sup>312</sup> Thus, the implementing *legislation should* state that no injunctive relief against any CWC inspection shall be issued by any court. Instead of an injunction, provision should be made (as detailed in the following section) for any person who is damaged by an inspection to seek compensation by filing an appropriate monetary claim after the inspection is concluded.

#### 8.1.2 Provision for Damages.

Ensuring that injunctions will never be granted against CWC inspections requires that the implementing legislation make an alternative remedy available to victims of unreasonable searches. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of

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307. *Id.* at 440, 442 (citations and footnote omitted). *Accord*, *Virginia Surface Mining & Reclamation Ass'n, Inc. v. Andrus*, 604 F.2d 312 (4th Cir. 1979). *Yakus* was decided during the extreme crisis atmosphere of World War II, but has been repeatedly cited in later years for these propositions. *See, e.g.*, *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-13 (1981).

308. 28 U.S.C. § 7421.

309. *Cf. Linn v. Chivatero*, 714 F.2d 1278, 1282 (5th Cir. 1983), *later app.*, *Linn v. Chivatero*, 790 F.2d 1270 (5th Cir. 1986), *reh. den. en banc*, *Stassi v. Chivatero*, 798 F.2d 1412 (5th Cir. 1986) (Anti-Injunction Act does not bar plaintiff's suit in equity to recover records retained by the U.S. Internal Revenue Service in violation of Fourth Amendment).

310. The Act's underlying purpose is to allow the federal government to collect taxes without the threat of judicial intervention; a taxpayer's suit for a refund is the sole avenue for redress. *South Carolina v. Regan*, 465 U.S. 367 (1984); *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 5 (1962).

311. 29 U.S.C. § 101.

312. "Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. 'The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.' *Brown v. Swann*, 10 Pet. 497, 503. . . ." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1981), *quoting* *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946).

the laws, whenever he receives an injury."<sup>313</sup> Failure to provide such a remedy may interfere with the goal of verifying CWC compliance because the judiciary would otherwise be compelled to rule that the victim of a constitutional violation has no remedy whatsoever -- risking a determination that inspections pursuant to the CWC are unconstitutional.<sup>314</sup>

The implementing *legislation should* include a specific provision allowing victims to recover money damages from the United States, as an alternative to enjoining a CWC inspection.<sup>315</sup> Holding the federal government liable is logical since a purpose of United States entry into the Convention is to protect national security. The costs of accomplishing that task should rightfully fall on the federal government.<sup>316</sup>

However, because the "sovereign" government is traditionally thought to be "immune" from lawsuits, no person may sue the United States itself without its consent.<sup>317</sup> The Federal Tort Claims Act (FTCA)<sup>318</sup> establishes general circumstances where the federal government has consented to suit.<sup>319</sup> The FTCA's waiver of sovereign immunity is limited by thirteen exceptions, of which two are relevant to this discussion. First, the United States is not liable for any claim based upon the

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313. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

314. "[F]orbid[ding] the federal courts to issue all constitutionally adequate remedies for a particular category of claims raises serious problems. . . . [T]he court in question must be empowered to grant relief that is at least reasonably effective." Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 85 (1981).

315. In providing remedies and defining procedure in relation to cases and controversies in the constitutional sense the Congress is acting within its delegated power over the jurisdiction of the federal courts which the Congress is authorized to establish. Exercising this control of practice and procedure the Congress is not confined to traditional forms or traditional remedies. . . . In dealing with methods within its sphere of remedial action the Congress may create and improve as well as abolish or restrict.

*Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937).

316. As discussed in section 3.2, *supra*, a CWC inspection must be considered an act of the federal government even though the inspectors will themselves be foreign nationals under the authority of the CWC Technical Secretariat.

317. "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*." Note, *Rethinking Sovereign Immunity After Bivens*, 57 N.Y.U. L. REV. 597, 608 (1982), quoting THE FEDERALIST NO. 81, at 508 (A. Hamilton) (H. Lodge ed. 1908) (emphasis in original).

318. Act of Aug. 2, 1946, ch. 753, tit. IV, 60 Stat. 842 (principally contained in 28 U.S.C. §§ 1346(b), 2671-2680).

319. 28 U.S.C. §§ 1346(b), 2680. A suit under the FTCA should be distinguished from an action against the offending officials in their personal capacity. The decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Investigation*, 403 U.S. 388, 397 (1971), established that persons who are subject to searches in violation of the Fourth Amendment are entitled to recover damages personally from those who carry out the unconstitutional search. The difference between a *Bivens* suit and an action under the FTCA is that damages in a *Bivens* suit would be paid personally by the responsible government official, whereas the federal government would be responsible for paying the plaintiff who wins a Federal Tort Claims Act case. As to when either or both of these remedies may be available for a similar offense, see *Carlson v. Green*, 446 U.S. 14 (1980).

performance of a "discretionary function" by a federal official.<sup>320</sup> Second, the federal government is not responsible for damages caused by the commission of various intentional torts, including violations of Fourth Amendment rights, so long as the commission was in good faith.<sup>321</sup>

If the federal government can successfully invoke either of these exceptions in defending a claim for damages resulting from a CWC inspection, the plaintiff would be without any remedy at all against the government. The discretionary function exception is problematic because recent court decisions have expanded it to apply broadly to matters of national security.<sup>322</sup> Because of the obvious national security implications of the CWC, this precedent could justify a refusal to award damages no matter what the intrinsic constitutional merits. Similarly, the exception for good faith intentional torts by federal law enforcement officers is too far-reaching for the CWC. Its effect would be to allow suits seeking damages for illegal CWC inspections only where the inspectors acted in bad faith or without reasonable belief in the lawfulness of their actions.<sup>323</sup>

In order to provide a damages remedy against the United States, *legislation should* waive sovereign immunity under the Federal Tort Claims Act. Addition of a new subsection specifically consenting to suit for unconstitutional or wrongful arms control verification inspections would remove a legal barrier to enforcement of a citizen's right to damages, thereby eliminating any justification a judge may have for blocking operation of the treaty's implementing legislation for lack of any other remedy.

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320. 28 U.S.C. § 2680(a). "A public administrator 'has discretion whenever the effective limits on his power leave him free to make a choice among possible courses or action or inaction.'" WARREN, *ADMINISTRATIVE LAW IN THE POLITICAL SYSTEM* 360 (2d ed. 1988), *quoting* K. DAVIS, *DISCRETIONARY JUSTICE* 4 (1980). "The discretionary function exception thus should clarify the distinction between the formulation of policy by high-ranking officials and the routine implementation of policy by subordinates." Kellman, *supra* note 287, at 1605.

321. *Norton v. United States*, 581 F.2d 390, 395 (4th Cir.), *cert. denied*, 439 U.S. 1003 (1978). These acts include "assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution." 28 U.S.C. § 2680(h), *amended by* Pub. L. 93-253, § 2 (1974).

322. In *Boyle v. United Technologies*, 487 U.S. 500 (1988), the Court applied the discretionary function exception to immunize private defense contractors from tort liability for defective weaponry. In *Allen v. United States*, 816 F.2d 1417 (10th Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988), the exception was applied to immunize all official conduct pertaining to atomic testing from injury claims brought by U.S. civilians and servicemen. See Kellman, *supra* note 287.

323. *Norton v. United States*, 581 F.2d at 397.

## 8.2 TRADE SECRET PROTECTION AND COMPENSATION.

The potential loss of trade secrets<sup>324</sup> resulting from CWC operations is a central concern of both the negotiators and the chemical industry. "The fact is that in the competitive worldwide chemical industry, proprietary knowledge associated with the production of certain chemicals or products using those chemicals is a company's single greatest possession."<sup>325</sup> CWC implementing *legislation should* provide for both the means of protecting trade secrets and for compensating owners for any losses that might follow from compliance with the convention.

### 8.2.1 Trade Secret Protection.

Trade secrets are property that may be subject to disclosure to the government for a public purpose despite the risk of subsequent revelation to a competitor.<sup>326</sup> Because the CWC achieves an important public purpose, there can be no injunction against the government requiring access in the course of enforcing the CWC.<sup>327</sup>

To the extent the CWC implementing legislation can prevent trade secrets from being lost at all, considerable money and controversy might be saved. The Draft Convention contains its own restrictions on how inspectors may handle "confidential information"<sup>328</sup> and authorizes "State Parties [to] take such measures as they deem necessary to protect confidentiality" provided that they comply with the CWC.<sup>329</sup> Consideration should be given, therefore, to authorizing Schedule 1, 2 or 3 facilities to notify the National Authority of the existence of trade secrets that they must report for declaration to the International Organization pursuant to the CWC.

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324. "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

- (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and
- (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Uniform Trade Secrets Act (UTSA), 14 U.L.A. 541 (1980).

325. Olson, *The U.S. Chemical Industry Can Live with a Chemical Weapons Convention*, ARMS CONTROL TODAY, Nov. 1989, at 21.

326. *Ruckelshaus v. Monsanto Co.*, 476 U.S. 986, 1012 (1984).

327. A taking for a public use may entitle the owner to obtain damages, but not to enjoin the government's actions. *Id.* at 1016. *See also* *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979). *But see* *Conax Florida Corp. v. United States*, 625 F. Supp. 1324 (D.D.C. 1985), *summary judgment granted on reconsideration*, 641 F. Supp. 408, *aff'd*, 824 F.2d 1245 (D.C. Cir. 1986) (enjoining release by the Navy of confidential and proprietary drawings prepared pursuant to a Navy procurement contract).

328. *See generally* *Draft Convention*, *supra* note 1, app. I, Annex on the Protection of Confidential Information.

329. *Id.* ¶ C(1).

FIFRA provides a model of a trade secret protection policy that is designed to minimize the possibility of revelation.<sup>330</sup> Section 10 is a comprehensive system for protecting trade secrets that must be divulged to the U.S. Environmental Protection Agency in order for it to regulate pesticides.<sup>331</sup> It includes provisions for specifying data that the submitter considers to be trade secrets,<sup>332</sup> resolving disputes about this designation,<sup>333</sup> restricting revelation of this material outside of the Agency,<sup>334</sup> and providing compensation for unauthorized revelation.<sup>335</sup> While adaptation to the special needs of the CWC would require additional study as the final form of the treaty nears, the implementing *legislation should* rely on this model as a good starting point.

### 8.2.2 Compensation for Lost Trade Secrets.

No matter how comprehensive and well-administered the system for protecting trade secrets, situations may arise where they are lost due to the operation of the CWC. Such losses may have constitutional implications because trade secret owners are entitled to compensation when the government reveals their information in a way that destroys the competitive advantage that exclusive access to the data confers.<sup>336</sup>

That the government requires trade secret disclosure does not necessarily result in a taking. Mandatory reporting to the government of data rationally related to a legitimate regulatory interest in exchange for a government benefit (e.g., providing the results of proprietary safety tests in order to qualify for a license to produce a product), is not a taking if the firm is aware of the conditions under which it is to be submitted and how it is to be used.<sup>337</sup> The extent of the government's obligation to protect the secret is measured by the terms of the statutory regime's guarantee of confidentiality.<sup>338</sup>

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330. Another model might be provided by the Freedom of Information Act, which also protects trade secrets from disclosure. See 5 U.S.C. § 552(b)(4). However, one commentator regards current court interpretations of this statutory protection as inadequate. See Note, *Federal Disclosure Statutes and the Fifth Amendment: The New Status of Trade Secrets*, 54 U. CHI. L. REV. 334, 362-67 (1987).

331. 7 U.S.C. § 136h.

332. *Id.* § 136h(a).

333. *Id.* § 136h(c).

334. *Id.* § 136h(b).

335. *Id.* § 136h(f).

336. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003-04, 1011 (1984). Indeed, the trade secrets in question in *Monsanto* involved data regarding pesticides, which are one category of chemicals whose "building blocks" are included among those listed in Schedule 3 of the Draft Convention. See Olson, *supra* note 325, at 22 ("agricultural chemicals").

337. *Id.* at 1007.

338. *Id.* at 1006-07.



Subsequent government revelation may be a taking if its initial disclosure to the government did not voluntarily contemplate its later release.<sup>339</sup> An owner is entitled to compensation for lost value when the government reveals, without the owner's permission, a trade secret originally obtained for a public use.<sup>340</sup> If the government breaches whatever secrecy guarantee is embodied in the law and thereby destroys the competitive advantage that exclusive control over the data confers, then a taking occurs.<sup>341</sup> The owner would be entitled to recover damages under the Tucker Act.<sup>342</sup>

Owners of trade secrets that are revealed during CWC inspections may claim damages for a taking. The implementing *legislation could* partially solve this problem by amending domestic regulatory schemes that require disclosure of trade secrets relevant to the CWC to put regulated firms on notice that their trade secrets may be so revealed.<sup>343</sup> Of course, this would not entitle the International Organization to subsequently disclose trade secrets thereby diminishing their value.

One solution that has been suggested is that "Congress provide a nonburdensome administrative process for the payment of just claims that might arise from [CWC] inspections, including claims for the loss of trade secrets and other intellectual property."<sup>344</sup> This provision of the implementing *legislation could* be modeled on section 3(c)(1)(D)(ii) of FIFRA, which provides for the value of trade secrets revealed by the U.S. Environmental Protection Agency to be established through binding arbitration under the auspices of the Federal Mediation and Conciliation Service.<sup>345</sup>

Further research is needed to define these potential solutions more precisely. At a minimum, the extent to which the United States needs to assume liability for loss of trade secrets caused by the operation of the CWC<sup>346</sup> and the burden of proof that it should impose on complainants alleging a loss are questions that deserve considerably greater attention. The important point here is that such losses need not be uncompensated, nor need they raise constitutional conflicts with the CWC.

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339. Important considerations include the "character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations." *Id.* at 1005. See also *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 225 (1986).

340. *Monsanto*, 467 U.S. at 1003-04.

341. *Id.* at 1011-12.

342. "The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491.

343. See section 5.3.3.1, *supra*.

344. Carnahan, *supra* note 65, at 177.

345. 7 U.S.C. § 136a(c)(1)(D)(ii).

346. Complications might be created by the non-American character of the International Organization. The Draft Convention provides that neither the Organization nor inspectors may be held liable for any breach of confidentiality. *Draft Convention*, *supra* note 1, app. I, Annex on the Protection of Confidential Information, ¶ D(5); Protocol on Inspection Procedures, *supra* note 1, pt. I, ¶ III (2)(i). Therefore, a particularly difficult question is whether the Tucker Act would be available where the cause of the trade secret's revelation is misappropriation by an inspector.



## SECTION 9

### CONCLUSIONS

The Draft Chemical Weapons Convention offers a unique opportunity to eradicate chemical weapons stockpiles and verify their continued absence. With its selection of on-site inspections as the primary system of verification, the CWC presages a new foundation for international security based neither on fear nor on trust, but on regulation by a legal regime. Every step taken to increase that regime's effectiveness necessarily intrudes upon individual freedom in those states that enter the treaty. In the United States, the CWC raises difficult questions of constitutional rights that cannot be ignored.

The thesis of this report is that the CWC's ambitious goal of ridding the world of the scourge of chemical weapons need not be threatened by potential legal problems. This analysis has developed the idea that implementing the CWC verification scheme can and should respect constitutionally protected rights in the course of fulfilling these treaty obligations. Cherished American values need not be forsaken in the pursuit of security.

Satisfying these objectives requires that careful attention be paid to crafting precise limits on performing on-site inspections. This study outlines implementing legislation that will integrate the needs of the CWC and potentially conflicting constitutional rights. Specific changes are also required in the Draft Convention itself to address certain situations where implementing legislation cannot resolve a constitutional problem that might arise during verification inspections.

While not every problem can be predicted, it is beyond question that the American judiciary will accord great respect to deliberate efforts to harmonize the protection of individual liberties with national security interests. As enforceable chemical weapons control becomes a reality, the ability to resolve the issues raised here will demonstrate how effectively the United States Constitution can endure as a pillar of world order. Ultimately, this report concludes that American constitutional democracy has the strength and flexibility to accomplish international arms control under law.



## APPENDIX A

### SUMMARY OF RECOMMENDATIONS TO HARMONIZE THE CHEMICAL WEAPONS CONVENTION WITH THE UNITED STATES CONSTITUTION

This Appendix presents a summary of the implementing legislation and changes to the Draft Convention that this report concludes would be necessary to harmonize the Convention with the United States Constitution. Table A.1 abstracts the major provisions of the implementing legislation, while Table A.2 covers the changes to the CWC.

In addition to providing an index indicating where extended discussion can be found in this study on each issue, these tables group the summaries by major topic within the report. Each necessary change is contained in the right column, within a separate box headed by a brief explanation in italics of the constitutional problem the ensuing recommendations address. The recommendations within the boxes are each assigned a unique number for easy reference.

Since the report is organized by subject and intentionally combines implementing legislation provisions with changes in CWC text, it was thought that readers would benefit from a presentation that separates the recommendations into these two key components. But it must be remembered that in certain instances both implementing legislation and CWC changes are necessary to make an aspect of the CWC constitutional. Furthermore, certain provisions of implementing legislation and changes to the CWC are presented in the report text as alternatives, each with its own advantages and disadvantages from a constitutional standpoint. Thus, these tables are best used in conjunction with the main body of the analysis.

**Table A.1. Recommended implementing legislation to harmonize the chemical weapons convention with the United States Constitution.**

Page	Section	Recommended Legislative Provision
		<i>Warrantless inspections of government contractors or licensees are constitutional if Fourth Amendment rights are waived as a condition of the contract or license.</i>
17	4.2.2	(1) Require that every declared facility that holds a government contract or licensee, as well as all contractors and licensees whose activities involve national security, expressly waive Fourth Amendment rights regarding the CWC as condition of continuing to receive these government benefits.

**Table A.1. Recommended implementing legislation to harmonize the chemical weapons convention with the United States Constitution (Continued).**

Page	Section	Recommended Legislative Provision
		<i>Warrantless routine inspections of nongovernment contractor Schedule 1 and 2 facilities are constitutional if these facilities are within the "pervasively regulated industries exception" to the Fourth Amendment warrant requirement.</i>
26	5.3.1.1	(2) Establish that acquisition of chemical weapons or key precursors in violation of the CWC would threaten national security.
26	5.3.1.1	(3) Assert the United States' commitment to the International Organization and affirm that the CWC inspection scheme is essential to United States compliance with CWC.
26	5.3.1.2	(4) Assert that a domestic regulatory scheme is necessary to fulfill CWC obligations.
27	5.3.1.2	(5) Create a National Registry for CWC scheduled facilities.
27	5.3.1.2	(6) Empower the National Authority to check accuracy of declared information.
27	5.3.1.2	(7) Require scheduled facility operators to maintain appropriate records.
27	5.3.1.2	(8) Authorize the National Authority to formulate national monitoring plan for scheduled facilities.
27	5.3.2	(9) Provide that CWC routine inspections may be conducted without search warrants or judicial interference, and provide that they may be carried out by international inspectors.
27	5.3.2	(10) Provide that the National Authority may search scheduled facilities without warrants.
28	5.3.3.1	(11) Incorporate by reference all CWC verification provisions.
28	5.3.3.1	(12) Empower the National Authority to conduct warrantless searches of facility records.
28	5.3.3.1	(13) Require that scheduled facilities be presented credentials and written statement of reason for inspection.

**Table A.1. Recommended implementing legislation to harmonize the chemical weapons convention with the United States Constitution (Continued).**

Page	Section	Recommended Legislative Provision
28	5.3.3.2	(14) Provide that routine inspections and monitoring may only be conducted in accordance with CWC.
28	5.3.3.2	(15) Limit warrantless inspections by the National Authority to what is necessary to assure compliance obligations to the International Organization.  NOTE: CWC CHANGES ARE ALSO REQUIRED.
30	5.3.3.2	<i>Compelled access into declared facilities subject to routine inspections may be obtained even if the facility owner resists.</i> (16) Provide that access to a declared facility during a routine inspection may, if necessary, be compelled by the use of reasonable force exercised by the National Authority.
30	5.3.3.2	(17) Provide that any federal judge or magistrate is authorized to issue an inspection warrant upon presentation of appropriate credentials and proof that the facility to be inspected is, in fact, a declared facility under the CWC.
39	6.2.1.1	<i>Warrantless challenge inspections of declared facilities may be constitutional if the "pervasively regulated industries exception" to Fourth Amendment warrant requirement is extended to challenge inspections.</i> (18) Provide that warrantless challenge inspections of Schedule 1 and 2 facilities may be conducted for the same reason and to the same effect as routine inspections.
39	6.2.1.1	(19) Assert Congressional intent to stretch limits of Fourth Amendment to greatest possible extent possible to fulfill CWC obligation to permit challenge inspections of Schedule 3 facilities.
40	6.2.1.1	(20) Establish a licensing system that conditions possession of scheduled chemicals on waiving constitutional objections to warrantless CWC inspections.  NOTE: ALTERNATIVE CWC CHANGES ARE ALSO RECOMMENDED.

**Table A.1. Recommended implementing legislation to harmonize the chemical weapons convention with the United States Constitution (Continued).**

Page	Section	Recommended Legislative Provision
		<i>Challenge inspections of undeclared facilities may be constitutional if undertaken pursuant to an administrative search scheme.</i>
42	6.2.2.2	(21) Authorize judges to issue administrative search warrants.
42	6.2.2.2	(22) Provide for expedited review of warrant applications.
43	6.2.2.2	(23) Authorize inspections to proceed even if resisted.
47	6.3.2.2	(24) Establish that the scheme of pervasive regulation for scheduled facilities applies to means of transport owned or leased by those facilities.
47	6.3.2.2	(25) Specify that all commercial means of transport carrying Schedule 1, 2 or 3 chemicals are subject to warrantless CWC searches.
47	6.3.2.2	(26) Require declared facilities to post signs conditioning vehicle entry on agreement to permit warrantless search of the vehicle.
		NOTE: CWC CHANGES ALSO ARE REQUIRED.
		<i>Interview of facility personnel during CWC inspections may be compelled by subpoenas.</i>
53	7.1.1	(27) Vest in the National Authority the power to issue subpoenas.
		<i>Taking human biomedical samples may be legal under the Fourth Amendment if carried out under a specific plan to serve a special governmental need.</i>
55	7.1.2.1	(28) Authorize the National Authority to assist in biomedical testing at inspected facilities.
56	7.1.2.1	(29) Protect against all excessive or unnecessary intrusions on personal privacy.
59	7.2.2	(30) Authorize the National Authority to grant use immunity for testimony given pursuant to CWC inspections.



**Table A.1. Recommended implementing legislation to harmonize the chemical weapons convention with the United States Constitution (Continued).**

Page	Section	Recommended Legislative Provision
59	7.2.2	<p><i>Compelling testimony from recalcitrant witnesses during CWC inspections may be legal under the Fifth Amendment if that testimony cannot later be used against the witness.</i></p> <p>(30) Authorize the National Authority to grant use immunity for testimony given pursuant to CWC inspections.</p>
59	8.1.1	<p><i>A ban on court injunctions halting CWC inspections in order to eliminate the possibility of judicial interference with the CWC may be legal where there is a significant interest in uninterrupted continuance and where alternative remedies are available.</i></p> <p>(31) Prohibit any court from granting injunctive relief to any person against any CWC inspection.</p> <p>(32) Assert that the appropriate remedy for any person harmed by an inspection is to seek monetary damages.</p> <p>(33) Waive sovereign immunity under Federal Tort Claims Act to grant damages to victims of unconstitutional CWC inspections.</p>
63	8.1.2	
64	8.1.2	
66	8.2.1	<p><i>Requiring disclosure of trade secrets during CWC inspection may be legal if the disclosed information is taken pursuant to a comprehensive trade secret protection scheme.</i></p> <p>(34) Regulate CWC trade secrets similarly to section 10 of the Federal Insecticide, Fungicide, and Rodenticide Act.</p> <p>(35) Amend existing domestic regulatory schemes that require disclosure of trade secrets relevant to CWC, putting their owners on notice that such secrets may be revealed pursuant to CWC.</p> <p>(36) Design a simple administrative process for paying claims for lost trade secrets.</p>
67	8.2.2	
67	8.2.2	

**Table A.2. Summary of recommended changes in the chemical weapons convention to harmonize it with the United States Constitution.**

Page	Section	Recommended Change to Draft Chemical Weapons Convention
		<i>Warrantless routine inspections of nongovernment contractor Schedule 1 and 2 facilities are constitutional if these facilities are within the "pervasively regulated industries exception" to the Fourth Amendment warrant requirement.</i>
29	5.3.3.2	(1) Make routine inspections certain and regular by specifying their frequency.
29	5.3.3.2	(2) Limit documents that CWC inspectors may examine during routine inspections to those that are relevant to facility declaration requirements.
30	5.3.3.2	(3) Exclude personal property and space from routine inspections.  NOTE: IMPLEMENTING LEGISLATION PROVISIONS ARE ALSO REQUIRED.
		<i>Warrantless challenge inspections of declared facilities will not pose constitutional problems if they can be refused when their accomplishment would be contrary to the Constitution.</i>
40	6.2.1.2	(4) Subject challenge inspections of declared facilities to the "legal obligations" of a State Party.  NOTE: IMPLEMENTING LEGISLATION PROVISIONS ARE ALSO RECOMMENDED.
		<i>Activities to secure the site of challenged facilities will comply with the Fourth Amendment if they are limited in time, place and scope.</i>
45	6.3.1.2	(5) Require that detention of persons during inspections of means of transport at challenged sites be brief, and that such inspections be performed diligently.
47	6.3.2.2	(6) Render passenger vehicles immune from search upon exiting a challenged facility.

**Table A.2. Summary of recommended changes in the chemical weapons convention to harmonize it with the United States Constitution (Continued).**

Page	Section	Recommended Change to Draft Chemical Weapons Convention
49	6.3.3.2	<p>(7) Allow the Technical Secretariat to approve for perimeter monitoring at challenged sites only equipment that is highly selective for evidence of illegal conduct.</p> <p>NOTE: IMPLEMENTING LEGISLATION PROVISIONS ARE ALSO REQUIRED.</p>
56	7.1.2.2	<p><i>Human biomedical sampling will not pose constitutional problems if appropriately restricted.</i></p> <p>(8) Prohibit biomedical sampling if its technical value is unproven.</p>
56	7.1.2.2	<p>(9) Permit biomedical sampling only of persons whose physical proximity to chemical processes makes the presence of biochemical indicators likely.</p>
57	7.1.2.2	<p>(10) Limit biomedical sampling methods to reduce their intrusiveness.</p> <p>NOTE: IMPLEMENTING LEGISLATION PROVISIONS ARE ALSO RECOMMENDED.</p>
58	7.2.1.1	<p><i>The CWC requirement for enactment of domestic penal legislation will not create constitutional problems for verification inspections if appropriately restricted.</i></p> <p>(11) Delete the penal legislation requirement.</p>
58	7.2.1.2	<p>(12) Exclude from the reach of penal legislation those activities that only violate CWC inspection obligations.</p>
59	7.2.1.3	<p>(13) Enable State Parties to fore swear the use of evidence obtained during on-site inspections in subsequent prosecutions.</p>
59	7.2.1.3	<p>(14) Enable State Parties to fore swear the use of evidence obtained during on-site inspections in subsequent penal proceedings that are not directly related to illegal production or trade of chemical weapons.</p>



## **APPENDIX B**

### **EFFECTS ON VERIFICATION**

#### **B.1 INTRODUCTION.**

The principal methods of verification of the CWC are "routine inspections" and "challenge inspections." Routine inspections permit the Technical Secretariat to verify that annual declarations for each destruction, production, and Schedule 1 or 2 facility are accurate. Their two goals are to deter violations without hampering the economic or technological development of State Parties, and to be accurate enough to permit a high degree of accord among the parties as to what actions constitute violations. Facilities holding Schedule 3 chemicals, while obligated to make annual declarations of their activities, will not be subject to routine on-site inspections.

Challenge inspections serve a complementary function. Based on suspicion by any State Party of noncompliance by another, challenge inspections can be of any "location or facility." They are relatively unconstrained, with the goal of clarifying "doubts about compliance."

Both types of inspection share the common goal of verifying the nonproduction of chemical weapons without interfering with the legal rights of State Parties or their citizens. The CWC's guiding principal is that on-site inspections be implemented in a manner that avoids undue intrusion into chemical activities for peaceful purposes.

The proposed alternative draft CWC language that may alleviate constitutional problems should not denigrate the quality of achievable verification. In general, there is no substantial impact on verification because of the legal issues addressed in the previous sections. Each proposed alternative was designed with the intention for allowing unhindered execution of the verification provisions.

This Appendix addresses the effect on verification that each of the options presented would have relative to the verification scheme that exists in the current Draft Convention (CD/1108). No analysis has yet been conducted to address what the impact on verification will be due to the United States Working Papers submitted July 15 and August 6, 1991, regarding challenge inspections.

#### **B.2 ROUTINE ON-SITE INSPECTIONS.**

The recommendation to specify the frequency of routine inspections may serve to make the routine inspection scheme more reliable by setting a minimum number of inspections for Schedules 1 and 2 facilities. This requirement makes the inspection regime more predictable in order to meet the United States implementation requirements that warrantless inspections of pervasively regulated industries must be "certain and regular."

There is, however, a possibility that this recommendation could negatively impact the CWC inspection provisions. In ensuring that inspections of declared facilities are certain and regular, the International Organization might allocate more resources to support the routine inspection regime at the expense of the challenge inspection provisions. Challenge inspections are more valued as a verification provision.

### **B.2.1 Searches of Commercial Documents.**

Replacing the subjective standard of the Draft Convention with a limit on searches of commercial documents may seem to diminish the ability to verify compliance with the CWC at a facility. If incriminating records are kept under a label that qualifies them on the surface as irrelevant to the CWC, inspectors would not have access to this information. However, it should be emphasized that the decision over whether inspection of commercial documents would be permitted in ambiguous situations would remain with the inspection team. Furthermore, even without such a recommendation, false records could be kept and submitted to inspectors while actual records were unavailable. The verification value of inspecting records allows inspectors to compare declared data with information obtained from other sources.

### **B.2.2 Searches of Personal Property.**

Placing "personal effects" off limits in inspectors poses no major obstacle to effective verification. The amount of evidence that could be discovered in searches of personal property, as well as the probability of finding it, is minimal. It is feasible that noncomplying facilities could designate, in bad faith, those areas in non-compliance as "private living spaces," thereby denying inspectors access to these areas. The extent to which the potential for falsely designating living quarters poses a problem for verification depends upon the ability of the inspectors to correlate the designation with other information.

### **B.2.3 Human Biomedical Samples.**

It is presently unclear whether a proven biomedical test for traces of Schedules 1 or 2 chemicals exists. If the technical basis for biomedical sample analysis is unproven, then such testing would be without verification value. If, however, biomedical sampling analysis is reliable, then the recommendation to eliminate such testing would deny inspectors a potentially important means of verification.

If biomedical sampling remains an option in the Draft Convention, the recommendations for selection of persons subject to testing and the procedures for the conduct of the tests will have no effect on the verification provision.

## **B.3 CHALLENGE INSPECTIONS.**

### **B.3.1 Detention of Persons or Property.**

The recommendation to limit the length of time a person could be restricted from leaving the site has no effect on verification. Any impact on verification depends upon how quickly the inspectors are able to conduct an effective inspection of a vehicle. The vehicles of greatest interest to inspectors would be large transports capable of carrying significant quantities of chemicals or manufacturing equipment.

### **B.3.2 Searches of Commercial Transport.**

Including the commercial means of transport that carry Schedules 1, 2 and 3 chemicals in the same category as facilities should enhance the value of inspections as a means of verification. It would provide the inspectors access to vehicles on the inspection site that could contain evidence regarding compliance. Based on the strict definition of facilities, it might be possible to "hide" evidence of a violation by storing bulk chemicals in tanker trucks or rail cars at the inspection site.

### **B.3.3 Perimeter Monitoring.**

The requirement that perimeter monitoring equipment at challenged sites be of maximum selectivity in the information that is collected does not diminish the verification capability of inspections in terms of chemical sensors. It is not likely that highly intrusive monitoring equipment would be installed at the perimeter of a challenged facility under any circumstances.

### **B.4 PENAL ENFORCEMENT.**

The provision for "penal legislation" in the Draft Convention adds little, if any, to the verification provisions discussed in section 2. The primary objective of the CWC is to deter noncompliance by requiring extensive disclosure, with a provision for penal legislation to prohibit conduct contrary to this objective. Therefore, the deletion of this provision would not diminish the verification value of the existing provisions.

The recommendation to define prohibited activities for the provisions of a penal statute has no impact on verification. In addition, altering facility agreements to include a consent to fore swear or limit the use of information obtained during on-site inspections in subsequent penal proceedings has no impact on the verification provisions provided for in the Draft Convention.

### **B.5 CONCLUSIONS.**

The Draft Chemical Weapons Convention offers to eradicate chemical weapons stockpiles and prevent their production through verification by on-site inspection. However, a rigorous verification scheme that can enforce a multilateral chemical weapons ban presents the possibility that international inspectors will intrude upon the Fourth Amendment right of Americans to be free from unreasonable searches and seizures.

This Appendix has discussed the effects of the recommendations contained in the main body of this report on verification under a Chemical Weapons Convention. The results of our analysis indicates that there is no substantially negative impact on the verification provisions of the CWC from the options proposed. In some areas, such as commercial transports, the suggested treaty language alteration will improve the current verification provisions.





## APPENDIX C

### ANALYSIS OF PECUNIARY LIABILITY

#### C.1 INTRODUCTION.

There is general agreement that a United States response to the CWC will require that some costs be borne by both the United States government and the private sector. Nevertheless, the overall magnitude of these costs and some potentially significant influencing factors remain uncertain.

The efforts reported here are based on assessments of constitutional and legal issues arising from the implementation of the CWC in the United States. Proposals have been made to resolve statutory, regulatory, litigative, or CWC text issues. The objective of this appendix is to present and discuss these recommendations, and to assess the resulting potential for monetary liability by both the government and private sectors.

#### C.2 BACKGROUND.

Some recent studies have assessed the costs attendant to the United States for participation in the CWC. However, they vary considerably in the degree to which causal factors are related to the costs and scope of cost contributions.

A report by the Institute for Defense Analysis (IDA)<sup>347</sup> identifies the costs attributable to inspections. In addition, this report presents estimates of these costs under a set of assumptions and framework that best captured the most recent requirements of the CWC (IDA used CD/961). The factors that were considered included travel costs, inspection team size, inspection frequency, facility type, number of facilities, On-Site Inspection Agency costs, and building and equipment costs. Nevertheless, the analysis excluded cost estimates for challenge inspections and additional on-site verification activities,<sup>348</sup> as well as certain other host expenses. By focusing on costs to support an international inspection regime, the costs associated with protecting sensitive United States facilities and the resulting regulatory burden on domestic industry were not developed.<sup>349</sup>

On the other hand, a report by the Congressional Budget Office<sup>350</sup> estimated compliance and on-site inspection costs for both the Bilateral Chemical Weapons Agreement and the Chemical Weapons Convention. The report presents a range of values for costs associated with both one time and recurring procedures for elimination, baseline inspections, suspect site inspection, equipment, short notice quota inspections, initial planning and management, and research and development. Although the categories of costs are meant to be comprehensive, there is no detailed discussion addressing the sources of these

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347. J. GROTTE, S. LEIBRANDT & D. SCHULTZ, INSPECTION COSTS FOR A MULTILATERAL CHEMICAL WEAPONS -- AN ANALYTICAL FRAMEWORK AND PRELIMINARY ESTIMATES (Institute for Defense Analysis Paper No. 2383, 1990).

348. *Id.* at IV-1.

349. *Id.* at IV-2.

350. M. O'HANLON, U.S. COSTS OF VERIFICATION AND COMPLIANCE UNDER PENDING ARMS TREATIES (U.S. Congressional Budget Office 1990).

costs and how the magnitudes were derived. Consequently, the impacts of the factors as identified in legal and constitutional analyses are not covered.

The process of legal disputes has been examined from an economic point of view in a recent article that appeared in the *Journal of Economic Literature*.<sup>351</sup> The process of legal disputes is viewed as a sequence of decisions made by both parties which involve weighing prospective gains and losses from their decisions. This article presents cost factors that would influence the decision by one or both sides of the dispute to proceed to a higher stage of the legal dispute (e.g., to proceed to a court trial rather than agreeing to a pretrial settlement). Despite the insights on the factors that affect how legal disputes will proceed and a detailed description of how disputes can be resolved through the process of litigation, the article does not present numerical examples that would illustrate hypothetical disputes and their resolution. The importance of this type of analysis is to understand the dimensions of the legal process from an economic perspective, to identify factors that will affect the decisions by either party to proceed in the legal dispute process, and to fully identify the costs of compliance.

### **C.3 IMPACT OF CHANGES TO THE ROLLING TEXT TO REDUCE CONFLICTS WITH THE FOURTH AMENDMENT.**

The purpose of this section is to develop a more complete understanding of the costs of the entire compliance process. This will serve to ensure that these costs are understood fully and can be identified and included in subsequent discussion and analysis.

#### **C.3.1 Suggested Changes.**

This report has suggested a series of changes to the Draft CWC that will allow for a more thorough treatment of cost of compliance issues as they relate to the Fourth Amendment.

#### **C.3.2 Impact.**

The basis for the suggested changes to the rolling text was to reduce the risk that an inspection would be withheld by the courts. This would reduce the chances of lawsuits being brought to federal courts. Therefore, this collection of recommendations is motivated by avoidance of costs.

There are further implications of these suggested changes. The specification of the frequency of routine inspections should not mean additional costs. The costs of additional inspections will depend on the degree of the inspection required, which will vary by many of those factors that are being outlined in this section.

The limitation of inspection authorities should not increase the cost to either inspector or host. The efficiency that this implies and the directness of the search will assure that frivolous searches and their costs will be minimized.

The limitation on human biomedical sampling could reduce these costs from those which could be incurred as a result of a broad interpretation; the directness of the specification should reduce or eliminate the potential for litigation as a result of such actions.

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351. Cooter & Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LITERATURE 1067 (1989).

## **C.4 IMPACT OF CHANGES IN LEGISLATION.**

### **C.4.1 Implementing Legislation to Alleviate Problems Stemming From the Fourth Amendment.**

This report has set forth several issues that require federal legislation to ensure that the Draft Convention conforms to the Fourth Amendment to the Constitution.

In general, the implementation legislation outlined in the main body of this report reduces the conditions under which litigation may be sought as a result of activities under the CWC. On the other hand, the suggested amendment of the Federal Tort Claims Act to provide alternative remedies could increase the costs by making it easier to claim damages from the federal government.

The exact step of the alternative remedies will determine the costs, but basically a balance will be sought between frequency of occurrence and the amount of settlement under any occurrence. In this balance, the system may resort to a litigation where the transaction and settlement costs would be high but (because, in part, of transaction costs) the frequency would be low, as contrasted to some administrative process where the transaction costs would be low and the settlement limited, but the certainty of recovery and the frequency of occurrence would be higher.

### **C.4.2 Implementing Legislation to Alleviate Problems Stemming From the Fifth Amendment.**

Although the CWC, as described in the Draft Convention, creates significant Fifth Amendment problems, the CWC rolling text need not be modified to take special account of them. Although the Draft Convention's requirement that State Parties permit interviews of people could conflict with the Fifth Amendment privilege to refuse to answer if the statement would be self-incriminating; but this may be remedied by granting immunity from prosecutorial use of incriminating statements. This act in itself should have no impact on costs. Indeed, it avoids costs that would result if litigation ensues.

The provision suggested in section 8.1.2 of this report would allow recovery of monetary damages resulting from searches that are judged unreasonable. Although this prevents blocking the inspection through lack of other recourse, the result could be additional costs to the federal government. Because of the difficulty in proving damages and relating these to a specific inspection, the costs to the federal government could be low in actual practice.

Additionally, even if the inspections under the Draft Convention create new opportunities for trade secret theft of property compensable under the Fifth Amendment, domestic legislation may provide just compensation. As indicated in the main body of this report, (section 8.2.2), the Court in *Ruckelshaus v. Monsanto Co*, 467 U.S. 986, 1016 (1983) wrote that "Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking." Since each of these constitutional violations could be remedied by an Act of Congress, changes in administrative regulations, or other domestic action, it is not necessary to change CWC language. As noted earlier in the discussion the regulatory changes that might be made could exclude some costs, but other changes (such as broadening of the concept of trade secrets) could increase pecuniary liability. The trade-off between litigation in court (which may be seldom, but expensive) and an administrative process governed by binding arbitration (which might have cases which are more frequent, but which have individual judgements which are lower) could lead to a least cost remedy to the government.

### **C.5 IMPACT OF OTHER DOMESTIC ACTIONS.**

Penal legislation, as specified, can have pecuniary impact as well. For example, if violations result in criminal acts, then costs of enforcement, prosecution and litigation will result, as well as expanded possibilities for litigation based on violation of Fourth Amendment rights.

The introduction of penal legislation could have a larger impact than potential Fourth Amendment conflicts. If the concept is eliminated, the issue is moot and the impact nonexistent. If it is retained, and the recommendation accepted, then any legislation would carry with it additional enforcement and prosecution activities, each with attendant costs. However, because of the broad intent of the term "penal legislation," administrative fines could be instituted. The scope and type of penal legislation should be crafted carefully to ensure that enforcement, prosecution, administrative, and litigation costs are kept to a minimum.

## **APPENDIX D**

### **DESCRIPTION OF "CWC LAW" ELECTRONIC REFERENCE SYSTEM**

#### **D.1 DESCRIPTION.**

BDM has created an electronic reference system known as "CWC Law" to supplement this report. The purpose of "CWC Law" is to present the results of a survey of legal authorities and precedents in digest form. "CWC Law" has been developed with an emphasis on ease of retrievability for an audience which includes senior law decision makers.

"CWC Law" is divided into Volumes I and II. Volume I appears on one low-density, 5¼-inch floppy disk. The contents of Volume I are divided into two sections. Section 1 forms the heart of "CWC Law" because it presents a collection of over two hundred citations in blue book format which pertain to different aspects of CWC implementation. Most of the citations provide the reader with the pertinent text of the case law cited by footnotes in the report. The citations are organized into different directories based on their particular relevance to CWC implementation. The subdirectories for Volume I, Section 1 are listed below:

- Treaties in the Law
- Fourth Amendment Applies to Inspectors
- Routine Inspections without a Warrant
- Statutory Consent to CWC Inspections
- Taking Samples
- Challenge Inspections with Administrative Warrants
- Inspecting Records
- Detaining Vehicles
- Interviewing Employees
- Nonintrusive Monitoring
- Guarding Trade Secrets

Volume I, Section 2 presents analyses of some of the most important law review articles pertinent to CWC implementation in the United States. "CWC Law" presents all nine of the analyses in standardized formats which include sections with title, author and publisher data. An additional section, entitled Distinguishing Features, identifies issues raised in the article which make it unique to the analyzed articles.

Volume II of "CWC Law" appears in three parts, each on its own separate low density, 5¼-inch floppy diskette. (Volume II is also available on two high density diskettes.) It presents the full text of

selected court cases which are heavily cited by the literature on the topic of CWC implementation. Volume II, part 1 also includes a full text reprint of *Legal Implementation of the Multilateral Chemical Weapons Convention: Integrating International Security with the Constitution*, by Edward A. Tanzman and Barry Kellman.

## **D.2 HOW TO USE "CWC LAW".**

To operate "CWC Law," the user must employ an IBM-compatible personal computer. Due to the compression of large amounts of data on the "CWC Law" floppy diskettes, the user's hardware must also incorporate a hard drive.

The following steps describe how to use "CWC Law:"

- (1) When the prompt appears for a floppy drive (A> for example), insert the CWC diskette of interest into that drive. For example, assume we have inserted Volume I.
- (2) Type: CWC. After a period of about thirty seconds (for the automatic loading files) a directory (or menu) will appear. During the thirty second delay, the words "Loading files . . ." may appear on the screen.
- (3) The main directory will appear with subdirectories listed as shown below (using Volume I as an example):

**CITATIONS ADDRESSING LEGAL ASPECTS OF THE CWC  
ANALYSES OF ARTICLES ON THE LEGAL ASPECTS OF THE CWC**

To look into the contents of a directory, put the cursor on the subdirectory of interest and press the return key. The highlighted letters (boldfaced here) reveal keys on the keyboard which, when pressed, will also open a file. In Volume I, what appears after the selection of a file will be a subdirectory of subordinate files, such as the one from the "CITATIONS ADDRESSING LEGAL ASPECTS OF THE CWC" subdirectory shown above in the description of Volume I, Section 1 (in the second paragraph of this Appendix).

- (5) Put the cursor on the subdirectory of interest and press the return key. What appears on the screen will be either specific citations, or a second subdirectory which breaks the topic of the first subdirectory into more specific topics. If a second subdirectory appears, repeat step 4 to get to the specific citations associated with the subdirectory's topic. Note: Volume II has only a main menu. When you choose a directory (court case), the full text appears on the screen next.
- (6) If you wish to print the contents of a subdirectory, press F3. (Instructions for other options appear in the margin of the screen). Do not press F3 unless the personal computer is connected to a printer or the system will fail and you may have to repeat steps 1 through 5.
- (7) In order to get back to a subdirectory or the main directory, press the escape key.

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22 April 1992

MEMORANDUM FOR DEFENSE TECHNICAL INFORMATION CENTER  
ATTENTION, FDTAC

SUBJECT: Pen-and-Ink Change to DNA-TR-91-216

Reference subject report titled, Harmonizing the Chemical Weapons Convention with the United States Constitution, dated April 1992, prepared under Contract DNA 001-90-C-0177.

Due to an administrative oversight, the sub-contractor and authors were omitted from the cover page of this report.

You are requested to make pen-and-ink changes to add the sub-contractor's name and authors to the front cover page as follows:

Edward A. Tanzman  
Barry Kellman  
Argonne National Laboratory  
9700 S. Cass Avenue  
Argonne, IL 60439-4832

Additionally, you are asked to make a pen-and-ink change to paragraph 6.1.1 of page 33 to read: 'The Director General must give prompt notice to the challenged State Party, not less than 12 ...

We apologize for the oversight and any inconvenience this may have caused.

FOR THE DIRECTOR:

*[Signature]*  
*Ethel D. Seacco*  
BARRY D. SHELKIN  
Assistant Director for  
Technical Information

ERRATA - A00163697

for

DNA-TR-91-216, UNCLASSIFIED, dated April 1992

**Harmonizing the Chemical Weapons Convention  
with the United States Constitution**

Please replace the present cover of this report with the attached corrected one and, in pen and ink, on page 33, change the word "requesting" to "challenged," so the first line will read "The Director General must give prompt notice to the challenged State Party, not less than 12...."



## Defense Threat Reduction Agency

8725 John J Kingman Road MS 6201  
Ft Belvoir, VA 22060-6201

TDANP-TRC

August 1, 2001

MEMORANDUM TO DEFENSE TECHNICAL INFORMATION CENTER  
ATTN: OCQ/MR LARRY DOWNING

SUBJECT: DOCUMENT CHANGES

The Defense Threat Reduction Agency Security Office reviewed the following documents in accordance with the Deputy Secretary of Defense Memorandum entitled, "Department of Defense Initiatives on Persian Gulf War Veterans' Illnesses" dated 22 March 1995, and determined that the documents were unclassified and cleared for public release:

DNA-TR-93-84, AD-B244408, Acoustic Resonance Spectroscopy in CW Verification Tooele Field Trial (August 1992).

DNA-TR-93-129-V1, AD-B192045, Global Proliferation – Dynamics, Acquisition Strategies and Responses, Volume 1 – Overview.

DNA-TR-93-129-V2, AD-B192046, Global Proliferation – Dynamics, Acquisition Strategies and Responses, Volume 2 – Nuclear Proliferation.

DNA-TR-91-216, AD-B163637, Harmonizing the Chemical Weapons Convention with the United States Constitution.

DNA-TR-92-180, AD-B175230, Evaluation of the Concept of a List for the BWC.

DNA-TR-92-61, AD-B167663, Basic State Party Functions and Skills Under CWC.

DNA-TR-92-66, AD-B167357, Domestic Reporting Requirements for Chemical Industry.

DNA-TR-91-213, AD-B163260, Analysis of the Interactions Between Treaties.

DNA-TR-93-70, AD-B177262, Chemical Weapons Convention Inspections of Private Facilities Application of United States Environmental and Safety Laws.

DNA-TR-92-182, AD-B173450, Commercial Products from Demilitarization Operations.

DNA-TR-91-217-V3, AD-B169350, Chemical Weapons Process Parameters, Volume 3 – Users' Guide.

DNA-TR-92-116-SUP, AD-B175292, Technical Ramifications of Inclusion of Toxins in the Chemical Weapons Convention (CWC), Supplement.

DNA-TR-92-128, AD-B175452, Task 1 Report Target Vapor Identification and Database Development.

DNA-TR-92-196, AD-B174940, Task 2 Report Algorithm Development and Performance Analysis.

DNA-TR-93-68, AD-B178109, CW Detection Instrument R&D Design Evaluation.

Enclosed is a copy of the referenced memorandum. If you have any questions, please call me at 703-325-1034.

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